Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WASHINGTON HOSPITAL CENTER

and

AETNA CASUALTY AND SURETY CO.
(now known as TRAVELERS),

Petitioners,

v.

FLORENCE SNOWDEN

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE BENEFITS REVIEW BOARD HAD JURISDICTION TO REVIEW A §18(A) SUPPLEMENTARY COMPENSATION ORDER WHEN IT WAS THE FIRST AGENCY ORDER TO ANNOUNCE THE METHOD USED TO CALCULATE §10(F) ANNUAL ADJUSTMENTS.

2. WHETHER THE BRANDT/ HOLLIDAY METHOD OF CALCULATING §10(F) ANNUAL ADJUSTMENTS IS CONTRARY TO THE STATUTE AND ALSO VOID IN THE D.C. CIRCUIT BY THE TERMS OF THE BRANDT DECISION.

PARTIES TO PROCEEDING

The names of all the parties appear on the cover.

CORPORATE DISCLOSURE STATEMENT

Petitioners state, pursuant to Rule 29.6 of this Court, that Washington Hospital Center is wholly owned by Medlantic Healthcare Group, part of Medstar Health, and that Travelers, the successor corporation to Aetna Casualty & Surety Company, is a wholly owned subsidiary of Citigroup.

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Snowden v. Washington Hospital Center, BRB No. 95-2125 (Dec. 9, 1996) (unpublished).

Snowden v. Washington Hospital Center, Case File No. 40-134355 (C. Green, Assoc. Dir., OWCP Oct. 6, 1998) (Supp. Comp. Order).

Snowden v. Washington Hospital Center, BRB No. 99-0245 (Nov. 15, 1999)(unpublished), *aff'd on reconsideration*, Snowden v. Washington Hospital Center, BRB No. 99-0245 (June 30, 2000)(unpublished).

Snowden v. Director, OWCP, 253 F.3d 725, (D.C. Cir., June 19, 2001).

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is from a judgment entered by the United States Court of Appeals for the District of Columbia Circuit on June 19, 2001. Petitions for Panel Rehearing and for Rehearing En Banc were timely filed on July 27, 2001 and were denied by orders of the United States Court of Appeals for the District of Columbia Circuit on August 27, 2001. This Petition for Writ of Certiorari is timely filed within ninety days of those orders. The basis of this Court's jurisdiction is 28 U.S.C. §2101(c).

STATUTES

The pertinent texts of the specific statutory sections cited in this Petition are reproduced in the attached Addendum.

Federal Statutes:

33 U.S.C. §901 et seq (1982)
33 U.S.C. §908(f)
33 U.S.C. § 910(f)
33 U.S.C. §914(f)
33 U.S.C. §918(a)
33 U.S.C. §921(a)
33 U.S.C. §921(b)(3)
33 U.S.C. §921(c)
33 U.S.C. §922

District of Columbia Statutes:

36 D.C. Code §501-502 (1973)
36 D.C. Code §301 et seq. (1979)

STATEMENT OF THE CASE

PROCEDURAL HISTORY AND FACTS

Florence Snowden suffered a workplace injury in the District of Columbia in 1978. Her claim is covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (1982) as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973).[1]

Snowden was voluntarily paid temporary benefits. On March 18, 1992, after a hearing, an Administrative Law Judge of the Department of Labor found her entitled to permanent total benefits as of December 18, 1990. Snowden v. Washington Hospital Center, 88-DCW-0086 (ALJ Rippey, March 18, 1992). The award "includ[ed] periodic increases", a reference to the annual adjustments provided by §10(f) of the Act. 33 U.S.C. §910(f). No calculation method was mentioned. The ALJ also awarded second injury Special Fund relief. 33 USC §908(f). This decision was appealed to the BRB and was affirmed as to the permanent total award. Snowden v. Washington Hospital Center, BRB Nos. 92-1453 and 92 1453A (June 28, 1994) unpublished).

Litigation continued on §8(f) for three years, during which time Snowden's benefits were paid by the Special Fund. The §8(f) award was ultimately reversed by the BRB in December 1996. Snowden v. Washington Hospital

[1] The District of Columbia Workers Compensation Act cited above has been repealed and replaced by the D.C. Worker's Compensation Act of 1979, D.C. Code §36-301 et seq., which established a local workers compensation program administered by the District covering injuries occurring on or after July 26, 1982. While the legal issues presented in the instant case have limited precedential value in the D.C. Circuit, since they only apply to claims adjudicated under the old DC/LHWCA statute, the issues are of continuing relevance to the administration of the Longshore Act and its extensions.

Center, BRB No. 95-2125 (Dec. 9, 1996) (unpublished). Washington Hospital Center/Aetna, hereinafter referred to as Employer/Insurer, then reassumed the payment of ongoing benefits and reimbursed the Director, OWCP, USDOL, for benefits paid to Claimant by the Fund.

In early 1998, Aetna was contacted by OWCP regarding the §10(f) annual adjustment due in October 1997. This was the first annual adjustment to be assessed since Employer/Insurer re-assumed payments. Employer/Insurer questioned the calculation method used by OWCP, then took the only recourse available under the Act to challenge the adjustment. Employer/Insurer reduced Claimant's benefits, and requested that an order be issued specifying the method OWCP used to calculate the §10(f) adjustment, so an appeal could be taken to the BRB. Ultimately, OWCP issued a Supplementary Compensation Order pursuant to 33 U.S.C. §918(a), which stated that Aetna was required to make annual "cost of living adjustments" calculated "in accordance with the Holliday Decision." Employer/Insurer was ordered to pay the arrearage and a penalty pursuant to §914(f) of the LHWCA. 33 U.S.C. §914(f).

Employer/Insurer appealed this Supplementary Compensation Order to the BRB. In an unpublished Decision, Snowden v. Washington Hospital Center, BRB No. 99-0245 (Nov. 15, 1999)(unpublished) and an unpublished Decision on Reconsideration, Snowden v. Washington Hospital Center, BRB No. 99-0245 (June 30, 2000)(unpublished) the BRB held that jurisdiction was proper pursuant to 33 U.S.C. §921(b)(3) because the October 16, 1998 Supplementary Compensation Order was an original adjudication of the Brandt/Holliday issue. This calculation method had not previously been reduced to a formal compensation order and, therefore, this was the first opportunity Employer/Insurer had to raise the issue.

The BRB then concluded that the calculation used by OWCP, the Holliday/Brandt methodology, was not the law

in D.C. Act cases. Therefore, the Supplementary Order of October 16, 1998 was reversed.

Claimant appealed the BRB's Decision to the United States Court of Appeals for the District of Columbia Circuit pursuant to the review authority provided in 33 U.S.C. §921(c). Claimant raised the Board's jurisdiction to review the Supplementary Order, as well as the §10(f) calculation. On June 19, 2001, a panel of that court held the BRB had no jurisdiction. Snowden v. Director, OWCP, 253 F.3d 725, (D.C. Cir., June 19, 2001). It did not reach the substantive question of the §10(f) calculation. Aetna's petitions for panel rehearing or rehearing en banc were denied.

THE ARGUMENT

1. WHETHER THE BENEFITS REVIEW BOARD HAD JURISDICTION TO REVIEW A §18(A) SUPPLEMENTARY COMPENSATION ORDER WHEN IT WAS THE FIRST AGENCY ORDER TO ANNOUNCE THE METHOD USED TO CALCULATE §10(F) ANNUAL ADJUSTMENTS.

The decision of the panel of the D.C. Circuit held that since this case arose subsequent to a §18(a) Supplementary Compensation Order, 33 U.S.C. §918(a), the Benefits Review Board (BRB) did not have jurisdiction to review it pursuant to §921(b)(3).

The D.C. Circuit, citing decisions from two other circuits, Providence Washington Ins. Co. v. Director, OWCP, 765 F.2d 1381 (9th Cir. 1985) and Tidelands Marine Services v. Patterson, 719 F.2d 126 (5th Cir. 1983), held that the Longshore Act provides two separate avenues of appeal. Section 21(b)(3) provides for a general grant of review

jurisdiction to the BRB to hear and determine appeals raising a substantial question of law or fact taken from decisions within 30 days, 33 USC §921(b)(3), while orders for the collection of defaulted payments within the meaning of §18(a) are to be brought in the district court.

This is a convenient, easily administered distinction. And in cases such as Tidelands and Patterson, where the issue is simple failure to pay or timely pay compensation, it is consistent with the statutory language and the procedural scheme established by Congress. However, in the instant case, automatic application of this procedural test works an injustice and undermines Congressional intent. The statute clearly states that "substantial questions of law or fact" are to be reviewed, in the first instance, by the BRB pursuant to §21(b)(3). The instant case presents such a substantial question. But because the ambiguity emerged after the initial appeal period had run, the only means available to Employer/Carrier to effect judicial review was to default. In such cases, review jurisdiction must lie with the BRB.

In Tidelands, the employer's check for a lump sum compromise settlement payment was received by the claimant 18 days late, triggering a penalty. 33 U.S.C. §914(f). In Providence, the employer failed to initiate payment of benefits or to obtain a stay of payments after an ALJ's Compensation Order was issued and while it pursued a motion for reconsideration and an appeal. This also triggered the non-discretionary §14(f) penalty. In both of these cases the claimant ultimately obtained a Supplementary Order of Default. The instant case is entirely distinguishable from Providence and Tidelands in that it arises out of a late emerging genuine dispute regarding the calculation of the §10(f) annual adjustments, a "question of law or fact" that had never been explicitly addressed in a prior compensation order.

The Fifth Circuit considered a similar issue in Bray v. Director, OWCP, 664 F.2d 1045 (5th Cir. 1981) and held,

contrary to Tidelands, that in such limited circumstances the BRB has the authority to review an issue presented in a §18(a) order.

In Bray, a 1969 compensation order awarded benefits. It was not appealed, and the parties stipulated that it became final. In 1979, benefits paid reached the pre-1972 Act aggregate maximum of $24,000.00 and the carriers announced their intention to discontinue payments. Claimant requested a formal hearing. OWCP issued an order in 1980 that the carriers' liabilities had been discharged. Claimant appealed to the BRB. Without reaching the merits, the Board dismissed the appeal, citing §18(a), and reasoning that it was without jurisdiction since "[q]uestions concerning the enforcement of a compensation order and inferentially an analysis of the language in the order would appear to be the province of the federal district court in which (sic) the injury occurred."

The Fifth Circuit reversed the BRB stating:

> The proceedings instituted in 1979 are not a direct appeal of the 1969 order, but are properly styled an application for a supplementary order declaring a default in the payment of compensation under §18(a) of the LHWCA, 33 U.S.C. §918(a). [fn omitted] It is reasonable to suppose that the most common issue in a §18(a) proceeding, for which it was clearly designed, is an employer's failure to pay benefits where the compensation order clearly provides for them. The unusual case may arise, however, where an order is ambiguous or unclear, or uncertainty arises in its application, which was not reasonably apparent at the time of the entry of the order. Such a deficiency is distinct from an

> error of fact or law, which must be asserted within 30 days after filing of a compensation order. 33 U.S.C. §921(a). Where the order does not explicitly answer a question which emerges during the period of payment, there must be some means by which to address the rights of the parties. A §18(a) proceeding is appropriate for this purpose.

Bray at 1047. The Court then examined the pre-1972 amendment procedures under the Longshore Act and concluded that the new procedures established by the 1972 amendments did not take away the right to the review of deficiencies in compensation orders merely because they are asserted pursuant to §18(a).

Neither the Fifth Circuit's opinion in Tidelands nor the Ninth Circuit's opinion in Providence cite, discuss or distinguish Bray.

The instant case is also one of these "uncommon" and "unusual" cases presenting an issue which arose after the time for appealing the ALJ's decision had run. The calculation of annual adjustments was never addressed in any compensation order in this case. Employer/Insurer attempted, unsuccessfully, to raise the issue with OWCP. At that point, the only means to obtain review of the issue was to stop payments and force OWCP to issue an order on §10(f).

The underlying controversy is the interpretation of a "substantial question of law or fact", as contemplated by §21(b)(3), and not merely "a default by the employer in the payment of compensation due under any award", as described in §18(a). The Longshore Act should not be interpreted so simplistically and absolutely as to prevent substantive review of such disputes by the BRB, the forum created by Congress for that very purpose.

A. Employer/Insurer Did Not Have Timely Notice That OWCP Was Applying Brandt/Holliday.

The ALJ's March 1992 Compensation Order awarded permanent total benefits to claimant backdated to commence on December 1990. The Order acknowledged that §10(f) periodic adjustments would be due but it was silent as to the calculation method.

The only document in the record which mentions that the Brandt/Holliday interpretation of §10(f) was being applied in this case is an *undated* OWCP calculation sheet, which was an attachment to an *internal* OWCP letter dated Monday, April 27, 1992. This was 31 days after the ALJ's Compensation Order was filed and was the last day for filing an appeal with the BRB. There is no record evidence that this calculation sheet was ever served on Employer/Insurer by OWCP. And even if the information in the calculation sheet had somehow been communicated to Employer/Insurer, it was erroneous, insufficient and misleading as to the law.

The calculation sheet makes bare references, without citations, to "Holiday(sic) -Rate" and "Holiday(sic) Decision", the latter buried in a footnote. By this time the Fifth Circuit's Decision in Holliday v. Todd Shipyards Corp., 654 F.2d 415 (5th Cir. 1981) was a nullity since it had been reversed two years earlier. Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033 (5th Cir. 1990). The calculation sheet does not explain why it follows this empty precedent. Furthermore, the calculation sheet does not mention the D.C. Circuit's decision in Brandt v. Stidham Tire Co., 785 F.2d 329 (D.C. Cir. 1986), the only relevant case law out of the D.C. Circuit.[2]

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[2] Brandt's status as controlling precedent in the D.C. Circuit is also disputed in this case. The decision includes unusual language that

Neither Snowden nor OWCP have established that the information conveyed in the OWCP calculation sheet was communicated to Employer/Insurer within the statutory appeal period, if at all. It cannot be deemed part of the ALJ's Decision and Order. Therefore, the ALJ's decision is silent on the methodology for calculating §10(f) adjustments.

As stated in Bray, this is the "unusual case...where an order is ambiguous or unclear, or uncertainty arises in its application, which was not reasonably apparent at the time of the entry of the order." Bray at 1047. Employer/Insurer could not have timely appealed the §10(f) calculation. The only recourse was to stop payments and request that an order be issued. Snowden responded by initiating a §18(a) proceeding. The Fifth Circuit has held that, in such cases, the statute permits the Board to review the issues raised by the legal deficiency of the underlying order pursuant to §21(b)(3).

B. The D.C. Circuit's Statement That Employer/Insurer Paid For Years Without Challenging OWCP's Calculations Is Inaccurate.

The D.C. Circuit acknowledged that the ALJ's decision was silent as to the methodology for calculating the adjustments, but holds that it was "implicit in light of Brandt/Holliday and the fact that for years Aetna paid..." compensation including the higher Brandt/Holliday catch-up

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suggests the holding was dependent on the continued viability of Holliday. At the first opportunity, the BRB adopted this interpretation and held that the Brandt/Holliday rule for calculating §10(f) adjustments no longer applies in cases arising in the D.C. Circuit. Bailey v. Pepperidge Farm, Inc., 32 BRBS 76 (May 19, 1998). The question was presented to the D.C. Circuit in the instant case, but the panel refused to reach the issue since it found no jurisdiction.

adjustment. [3] An examination of the procedural history and the state of the case law at the time of the ALJ's 1992 decision paints a significantly different picture. In fact, Employer/Insurer paid ongoing benefits for only about nine months in 1992 and then again for about 14 months in 1997-98, the period when the instant controversy arose.

Snowden was paid temporary total benefits by Employer/Insurer up to the time of the ALJ's 1992 decision. The ALJ set a date for permanency 15 months before the date of his decision. The ALJ also awarded §8(f) second injury Special Fund relief, so that Employer/Insurer was only liable for the first 104 weeks of Snowden's permanent total benefits. After that initial limited period, all future benefits were to be paid by the Special Fund maintained by OWCP.

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[3] Snowden argued below that these voluntary payments amounted to an acquiescence in the calculation which had the finality and legal effect of an order and which cannot now be reopened or challenged. She also stated that the Employer/Insurer's appeal is an attempt to "collaterally attack an underlying compensation award through an appeal of a Section 14(f) penalty."

The general rule under the LHWCA is that final adjudications cannot be reopened except under the very limited circumstances allowed by Section 22 of the Act. 33 U.S.C. § 922. The BRB held that §22 did not bar this appeal since the issue was never adjudicated until the Associate Director issued his Supplementary Compensation Order on October 16, 1998.

Similarly, the appeal is not barred by the doctrines of law of the case, res judicata (claim preclusion) or collateral estoppel (issue preclusion) since those doctrines also depend on a prior adjudication before they can act as a bar. See generally, Nasem v. Brown, 595 F.2d 801 (D.C. Cir. 1979) (party must have had adequate opportunity to litigate issue in administrative proceeding before collateral estoppel doctrine will be applied); Simms v. Valley Line Co., 709 F.2d 409, 15 BRBS 178(CRT)(5th Cir. 1983) (res judicata and collateral estoppel apply only after a final adjudication); Stark v. Bethlehem Steel Corp., 15 BRBS 288 (1983) (Ramsey, dissenting in part) (law of the case applies to issues decided in a previous adjudication of the same case).

Therefore, at the time of the ALJ's Compensation Order in March of 1992, the Employer/Insurer's liability was: (1) some additional amounts for the past period from December 1990 to March 1992, (2) ongoing permanent total benefits from April to December 1992, and then (3) no further liability because the Special Fund would take over all remaining payments pursuant to §8(f).

The record does not reveal the date when Employer/Insurer made these adjusted payments, who performed the calculations, and what explanation accompanied those calculations. However, the internal OWCP letter of April 27, 1992 and its accompanying calculation sheet referencing Holliday could not have been sufficient timely notice to Employer/Insurer for purposes of filing a §21(b)(3) appeal.

With incomplete information, and the belief that its liability for benefits would completely terminate in December, at some unknown date Employer/Insurer paid. Years later, in December of 1996 when the §8(f) second injury Special Fund relief was reversed by the BRB, Employer/Insurer re-assumed payment of Snowden's compensation benefits. In early 1998, shortly after the Employer/Insurer's first §10(f) annual adjustment to benefits became due in October 1997, OWCP noticed a discrepancy in Employer/Insurer's adjustment calculation and requested clarification. When subsequent communications revealed the parties were using different methodologies and that these differences could not be resolved, Employer/Insurer proceeded with the only recourse available to force judicial review – a reduction of benefits.

Similarly, the D.C. Circuit's implication that Employer/Insurer's actions were simply motivated by the "change in law" created by the BRB's decision in Bailey v. Pepperidge Farm, Inc., 32 BRBS 76 (May 19, 1998) is inaccurate. The foregoing administrative history

demonstrates that the controversy arose well before Bailey with the annual adjustment computation of October of 1997.

2. WHETHER THE BRANDT/HOLLIDAY METHOD OF CALCULATING §10(F) ANNUAL ADJUSTMENTS IS CONTRARY TO THE STATUTE AND ALSO VOID IN THE D.C. CIRCUIT BY THE TERMS OF THE BRANDT DECISION.

A) The Fifth Circuit's Holliday method of calculating Section 10(f) adjustments was contrary to the statute and has been overruled by the Fifth Circuit sitting en banc.

Section 10(f) of the LHWCA provides for annual cost of living adjustments to permanent total disability benefits. These increases vary each year and are calculated as a percentage of the previous year's compensation rate. The percentage rate applied is the percentage rise each year in the national average weekly wage. Increases go into effect on October 1 of each year.

The past practice of OWCP, based on the language of the statute, was as follows: When a claimant became permanently totally disabled he continued to be paid at the same rate as if he were temporarily totally disabled until the next October 1st. On that date his benefits were adjusted upward by that year's set percentage. On the next October 1st, benefits were increased again, and so on. The increases compound annually so that, as the years passed, a larger and larger amount of a claimant's check was actually made up of adjustments rather than the base compensation rate.

In 1981, the 5th Circuit issued a decision drastically altering this simple system. In Holliday v. Todd Shipyards Corp., 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), the court

held that a claimant's first payment of permanent total disability benefits should include a compounding of all the annual adjustments applicable in the years since the claimant first became temporarily totally disabled. In effect, Holliday meant that claimants, like Snowden, who had received flat temporary total benefits for many years, were entitled to an immediate increase in their compensation rate when they started to receive permanent total benefits. This increase would vary for each claimant depending on the rates applied during their temporary total years. Of course, all future increases in benefits compounded or built upon this adjusted starting base.

The Holliday decision ignored the plain language of the statute and was not well reasoned. Nevertheless, it threw the administration of the Act into controversy, unleashed a storm of litigation and created a split in the Circuits.

In 1986, the D.C. Circuit was faced with the interpretation of §10(f). It did not examine the merits of the Holliday rationale. Disturbed that claimants in different circuits were receiving disparate benefits, the D.C. Circuit decided to follow the 5th Circuit's decision in Holliday, "at least until the precedent is overruled in the Fifth Circuit, or the Director publicly announces that, prospectively, he will seek to apply this current interpretation evenhandedly to all similarly disabled claimants in all circuits." Brandt v. Stidham Tire Co., 785 F.2d 329 at 332, 18 BRBS 73 at 78 (CRT).

In 1990, the 5th Circuit, sitting en banc, reversed Holliday. Phillips v. Marine Concrete Structures, Inc., 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990) (en banc).

B) The D.C. Circuit's Brandt decision is contrary to the statute and had also expired by its own language at the time of the compensation order in this case.

After Phillips, the BRB had an opportunity to consider §10(f) in a case arising in the D.C. Circuit. The Board held that Brandt had been vacated by its own terms and was no longer the law. Bailey v. Pepperidge Farm, Inc., 32 BRBS 76 (May 19, 1998). Unfortunately, the Bailey decision was not appealed and was never reviewed by the D.C. Circuit.

The language of the statute is very clear with regard to §10(f). The only adjustments allowed are the annual increases to be assessed on October 1st of each year on awards of permanent total disability or death benefits. The statute provides:

> (f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by **the lesser of –**
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or
> (2) **five per centum**.

33 U.S.C. §910(f) (1984 amendments added language in bold which applies prospectively to adjustments beginning October 1, 1984).

Indeed, Congress had previously rejected a version of the statute providing adjustments to all compensation, including temporary total. See S. 2318, 92d Cong., 2d Sess. 311 (1971) cited in Phillips, at 1035.

The statute is clear on its face. Annual adjustments are assessed only on permanent total disability compensation or on death benefits. They are assessed prospectively only. There is no provision for intervening increases for periods of temporary total disability to be credited to a claimant when she becomes permanently totally disabled. The legislative history also supports this position.

The D.C. Circuit declined to reach the substantive merits of this issue, holding that the BRB did not have jurisdiction. This Court should remand this case to the D.C. Circuit to address the §10(f) issue, specifically to clarify their position on the statutory authority for the Brandt calculation of §10(f) adjustments. In doing so, this Court will eliminate the continuing uncertainty and disparity in the administration of benefits across the circuits since Holliday was overruled.

CONCLUSION

The D.C. Circuit's decision to vacate the BRB's review of the substantive issue in this case on jurisdictional grounds should be reversed. The Fifth Circuit has held to the contrary, and the D.C. Circuit's rigid interpretation is contrary to the language and legislative intent expressed in §21(b)(3).

This case should be remanded to the D.C. Circuit for a ruling on the issue of §10(f) adjustments. Should the D.C. Circuit follow the Fifth Circuit and invalidate Brandt/Holliday, it should also address the curious limiting language in Brandt and determine whether that case was ever valid precedent in the D.C. Circuit after Phillips.

The D.C. Circuit should then proceed to review the propriety of the relief granted Employer/Insurer by the BRB.

Respectfully Submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 13, 2001 Decided June 19, 2001

No. 00-1318

FLORENCE SNOWDEN,
PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, ET AL.,
RESPONDENTS

On Petition for Review of an Order of the
Benefits Review Board

Richard W. Galiher, Jr. argued the cause and filed the briefs for petitioner.

Joshua T. Gillelan, II, Senior Attorney, argued the cause for respondent Director, Office of Workers' Compensation Programs. With him on the brief was *Carol A. De Deo*, Associate Solicitor.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Roger S. Mackey argued the cause and filed the brief for respondents Washington Hospital Center and Travelers Property Casualty Company.

Before: WILLIAMS, GINSBURG AND ROGERS, *Circuit Judges.*

ROGERS, *Circuit Judge*: This case is one of the last claims likely to be brought by a District of Columbia employee under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994).[1] Florence Snowden appeals an order of the Benefits Review Board of the United States Department of Labor overturning a supplementary compensation order of the Office of Workers' Compensation Programs. The underlying controversy is whether Ms. Snowden's compensation rate should include annual cost of living adjustments under § 910(f) of the Act for the years between her 1978 injury and the 1990 classification of her disability as permanent and total. The only question the court reaches, however, is whether the Board erred in asserting jurisdiction to review the supplementary compensation order. We join the other circuits that have addressed this question in holding that the Board lacked jurisdiction to review the order because it was issued pursuant to § 918(a), and thus became final when issued, with relief available only from the district court. Accordingly, we vacate the November 15, 1999 decision and order of the Board.

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[1] The Longshore and Harbor Workers' Compensation Act applies to injuries suffered by private-sector workers in the District of Columbia before July 24, 1982. Thereafter, the District of Columbia Workers' Compensation Act of 1979, D.C. Code § 36-301 to 36-345 (1981), applies. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, §§ 204, 302, 404, 87 Stat. 774, 783-84, 787-88 (1973). Because Ms. Snowden's injury occurred in 1978, we refer to the Longshore and Harbor Workers' Compensation Act as it applies in the District of Columbia as "the Act."

I.

Florence Snowden injured her back in 1978 while working as a psychiatric nurse at the Washington Hospital Center.[2] After a formal hearing, an Administrative Law Judge issued a compensation order in 1992 awarding her benefits under the Act for permanent total disability, "commencing December 18, 1990 and continuing for a period of 104 weeks thereafter, including periodic increases to which she may be entitled under the Act." Both the Office of Workers' Compensation Programs ("OWCP") and Aetna appealed to the Benefits Review Board; OWCP appealed the award of § 908(f)[3] relief to Aetna, while Aetna challenged the determination of permanent total disability. The Benefits Review Board affirmed the award of compensation but remanded the claim for § 908(f) relief.[4]

The 1992 compensation order did not specify the manner in which Ms. Snowden's benefit payments were to be calculated. Rather, the order simply stated that Aetna must "pay all periodic permanent total disability benefits . . .

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[2] For ease of reference, we refer to Ms. Snowden's employer, the Washington Hospital Center, and its insurer, Aetna Casualty & Surety Company (now known as Travelers Insurance Company) as "Aetna." We also refer to "OWCP," the Office of Workers' Compensation Programs, without distinguishing between actions taken by various officials in or on behalf of OWCP.

[3] Pursuant to § 908(f), the Special Fund, established in 33 U.S.C. § 944, will assume responsibility for permanent total disability payments after 104 weeks if "the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury . . . ." 33 U.S.C. § 908(f)(1).

[4] On remand, the Administrative Law Judge ruled that § 908(f) was inapplicable and denied Aetna's request for reconsideration. The Board affirmed on Aetna's second appeal. Aetna thereafter reimbursed the Special Fund for payments it had made to Ms. Snowden since December 1992 and reinstated payments at rates that included catch-up adjustments.

including periodic increases to which she may be entitled under the Act." Thus, the order did not explicitly state whether Ms. Snowden's compensation rate should reflect the annual cost of living adjustments under § 910(f), i.e., the "catch-up" adjustments, that had accrued in the years between her injury and the classification of her injury as a permanent and total disability.[5] Consistent with *Brandt v. Stidham Tire Co.*, 785 F.2d 329 (D.C. Cir. 1986), OWCP advised Aetna that Ms. Snowden's weekly compensation rate would increase from the $192.80 that she had received for temporary total disability to $357.80 for permanent total disability, a figure reflecting the § 910(f) catch-up adjustments compounded since her 1978 injury. Aetna paid Ms. Snowden as OWCP instructed.

Aetna did not challenge OWCP's methodology for computing Ms. Snowden's benefit payments until June 11, 1998. Then, relying on the Board's recent decision *in Bailey v. Pepperidge Farm, Inc.*, BRB No. 97-1156, 1998 WL 285563 (Benefits Review Bd. May 19, 1998), Aetna unilaterally cut Ms. Snowden's weekly benefit payments by nearly half, from $438.00 to $236.00, and requested an order from OWCP allowing it to take a credit under § 914(j) for $76,626.31 in

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[5] Under § 910, "Determination of Pay," subsection (f) provides that cost of living adjustments to compensation benefits are available only to those claimants whose disability is classified by OWCP as permanent and total. *See* 33 U.S.C. § 910(f).

alleged overpayments.[6] Ms. Snowden filed a claim under § 914(f)[7] for additional compensation for overdue installments based on Aetna's failure to pay in accord with *Brandt/Holliday*. OWCP issued a "supplementary compensation order" in 1998, finding Aetna in violation for failure to make more than $3500 in benefit payments, and liable, therefore, under § 914(f) for a penalty equal to 20% of the shortfall. Aetna paid Ms. Snowden

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[6] In *Brandt*, 785 F.2d at 332, this court adopted the interpreta tion of § 910(f) set forth in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 417, 422 (5th Cir. 1981), whereby § 910(f) catch-up adjustments were retroactive to the date of injury. In this opinion, we refer to "*Brandt/Holliday*" as the rule that applied when OWCP issued Ms. Snowden's 1992 compensation order. In 1990, the Fifth Circuit, sitting en banc, overruled *Holliday*. *See Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir. 1990). Some years later, in 1998, the Board held in *Bailey* that *Brandt/Holliday* "no longer applies to cases arising under the [ ] Act." *Bailey*, 1998 WL 285563, at *4. Henceforth, catch-up benefits under § 910(f) would no longer be retroactive to the date of injury but would apply only to periods after an injury was classified by OWCP as permanent and total. *See id.* In contrast to the request made by Aetna for a credit reimbursement, no retroactive adjustment arose in *Bailey*, 1998 WL 285563, at *1-*4, because the employer had never commenced paying at the retroactive catch-up rate, and in *Phillips*, 895 F.2d at 1035-36, the employer and the Board agreed not to seek reimbursement from the claimant.

[7] Section 914(f), "Additional Compensation for Overdue Installment Payments Payable Under Terms of Award," provides:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

33 U.S.C. § 914(f).

the past-due benefits but not the 20% penalty.[8] Aetna then appealed the supplementary compensation order to the Benefits Review Board.

The Board reversed OWCP's award of catch-up adjustments in the 1998 supplementary compensation order, while noting that because the penalty had not been paid, it "lack[ed] jurisdiction to address the propriety of the penalty." On reconsideration, the Board rejected OWCP's argument that the Board lacked jurisdiction because the 1998 supplementary compensation order was issued pursuant to § 918(a), and thus was subject only to review by the district court. The Board took the position that there had never been a formal determination in the 1992 compensation order that Ms. Snowden was entitled to § 910(f) catch-up adjustments retroactive to the date of her injury, and thus the alleged default of the catch-up adjustments was not "compensation due under any award of compensation" pursuant to § 918(a). In the Board's view, the 1998 supplementary compensation order was "an original adjudication of the *Brandt/Holliday* issue which is subject to review by the Board." The Board also ruled that Aetna would not receive credit for catch-up adjustments made prior to the *Bailey* decision but would be entitled to reduce Ms. Snowden's payments subsequent to *Bailey* so as to recover the amount of *Brandt/Holliday* overpayments.

II.

As a threshold matter, Ms. Snowden, joined by OWCP, contends that the Benefits Review Board lacked jurisdiction to review the 1998 supplementary compensation order because the order was issued under § 918(a), not § 921(a).

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[8] After Ms. Snowden filed for a default under § 918(a), OWCP issued a second supplementary compensation order in 1999 declaring the 20% penalty in default.

Our review of decisions and orders of the Benefits Review Board is for errors of law and for confirmation that the Board acted within the scope of its review in evaluating the decision of the administrative law judge. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 293 (D.C. Cir. 1990) (citing *Stark v. Washington Star Co.*, 833 F.2d 1025, 1027 (D.C. Cir. 1987); *Stevenson v. Linens of the Week*, 688 F.2d 93, 96-97 (D.C. Cir. 1982); *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979)). The Board does not make policy; "its interpretation of the [Act] thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (citing *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 94 (D.C. Cir. 1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 757 n.5 (7th Cir. 1979)). We hold that the Board lacked the jurisdiction to review the 1998 supplementary compensation order because it was a final order unreviewable by the Board.

The Act provides for review of compensation orders in two principal ways. Section 921 provides generally for the review of compensation orders by the Board.[9] Specifically, § 921(a)

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[9] Section 921, "Review of Compensation Orders," provides in subsection (b)(3):

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

33 U.S.C. § 921(b)(3).

provides that a compensation order shall become "effective" upon its filing pursuant to § 919, "unless proceedings for the suspension or setting aside [the] order are instituted" within thirty days. 33 U.S.C. § 921(a). Until that time, the Board has jurisdiction to "determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees. . . ." *Id.* § 921(b)(3). In contrast, § 918(a) addresses the collection of defaulted payments under an award of compensation.[10] Thus, where an employer has failed to make payment for thirty days after a payment is due under a compensation award, the claimant may file for a supplementary order declaring the amount in default;

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[10] Section 918, "Collection of Defaulted Payments; Special Fund," provides in subsection (a):

> In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. . . . The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. . . . Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. . . .

33 U.S.C. § 918(a) (footnote omitted).

the supplementary order becomes "final" when issued. *Id.* § 918(a). Review is not available by the Board, but only in an enforcement proceeding in the district court. *See id.* The Ninth Circuit has described the three prime distinctions between § 918 orders and § 921 orders:

> (1) [O]rders issued under § 918, unlike § 921 orders, are not appealable to the Board; (2) § 918 orders are final when issued unlike § 921 orders which do not become final until after 30 days or, if appealed, after appeal; and (3) as a result, § 918 supplementary orders can immediately be filed with the federal district court for enforcement.

Providence Wash. Ins. Co. v. Director, OWCP, 765 F.2d 1381, 1385 (9th Cir. 1985). OWCP maintains that "finality" under § 918(a) means that "such an order is not subject to the ordinary review process of § [9]21, at least where the amount declared in default has not been paid in full, because such review would be duplicative of that available from the district court."

As other circuits have observed, the Longshore and Harbor Workers' Compensation Act is "explicitly designed to encourage the prompt payment by employers of obligations under a compensation order notwithstanding the existence of an appeal." *Id.* at 1384. Thus, the Fifth Circuit stated that where employers fail to meet their obligations, § 918(a) "provides a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards, a theme central to the spirit, intent, and purposes of the [Act]." *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 129 (5th Cir. 1983). With that statutory purpose in mind, it follows that a § 914 order and a § 918 standard default order differ only in immaterial ways; under the former, OWCP must compute the 20% penalty amount that should be added to the default amount. An order issued under § 914(f) thus "is nothing more than a standard

default order, plus an additional arithmetic computation." *Providence*, 765 F.2d at 1386. Because § 914 directs that both the default amount and the penalty amount be paid at the same time, the terms of the statute explicitly reject any distinction between § 918 awards of "existing compensation" and § 914(f) awards of "additional compensation." *Id.* Both awards are "based on an appealable prior compensation order that resolves the substantive rights of the parties." *Id.*

Both the statute and caselaw indicate that whether the award of additional compensation for overdue installments and the declaration of the default are separately issued orders or combined into a single supplementary order is irrelevant. *See id.* at 1385; *Tidelands*, 719 F.2d at 128-29 & 128 n.3. In *Tidelands*, when the employer failed to pay the § 914(f) penalty due within thirty days after the filing of the award, OWCP issued a supplementary compensation order, finding the employer in default of the penalty under § 914(f). *See Tidelands*, 719 F.2d at 128 & n.3. The Fifth Circuit held that the second order was not a § 914(f) order because the clear "substance [of] the order was a 'supplementary order declaring the amount of the default' within the meaning of Section [9]18(a) of the [Act]...." *Id.* at 128 n.3. In *Providence*, the supplementary compensation order awarding a 20% penalty and the supplementary compensation order declaring default of the 20% penalty were combined into a single supplementary compensation order. *See Providence*, 765 F.2d at 1385. The Ninth Circuit adopted the Fifth Circuit's approach, observing that were the § 914(f) supplementary order "subject to § 921 procedures, it would be far more difficult and cumbersome for a claimant to collect both awards at the same time," as the Act contemplates. *Id.* at 1386. For, as the Ninth Circuit noted, the default amount would be immediately collectible, while the 20% penalty could be collected only after waiting for the expiration of the 30-day review period under § 921 and then

obtaining from OWCP a second supplementary order under § 918 declaring the first supplementary order in default. *See id.* The latter scheme, the court concluded, "is obviously needlessly duplicative and time consuming and completely at variance with Congress' intent," *id.* (citing *Tidelands*, 719 F.2d at 129), namely, to provide "a quick and streamlined mechanism for the collection of compensation under the [Act]." *Id.*

Consequently, "notwithstanding the general grant of jurisdiction to the Benefits Review Board contained in 33 U.S.C. § 921(b)(3)," the circuits to address the issue have concluded that "actions for the enforcement of orders declaring default in the payment of [installments] due under either § 914(f) or any other substantive section of the [Longshore and Harbor Workers' Compensation Act] are to be brought in the district court and, only subsequent thereto, by appeal to the appropriate court of appeals." *Tidelands*, 719 F.2d at 129; *see also Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 907 (3d Cir. 1994); *Providence*, 765 F.2d at 1386. We agree, for reasons set forth by the Fifth and Ninth Circuits, that such an interpretation is consistent with the statutory language and "far better" conforms to Congressional intent. *Providence*, 765 F.2d at 1386.

The 1998 supplementary compensation order was sought by Ms. Snowden pursuant to § 914(f) and resulted in OWCP's issuance of a supplementary order declaring Aetna in default of paying installments due under the 1992 compensation order. *See supra* n.8. As such, the 1998 order was manifestly an order for the collection of defaulted payments within the meaning of § 918(a). As OWCP states, the 1992 compensation order was "plainly premised on th[e] view" that *Brandt/Holliday* applied to all awards for permanent total disability under the Act, and "on the consequent proposition that the compensation [ ] calculated and declared in default was 'due under' the [1992

compensation order]." Respondent's Brief at 15. The Board's characterization of the 1998 supplementary compensation order as "an original adjudication of the *Brandt/Holliday* issue" ignores both this circuit's law at the time the 1992 compensation order was issued and OWCP's contemporaneous understanding of the compensation rate for permanent total disability benefits in the District of Columbia. The Board's interpretation would also mean delays in receipt of amounts due to claimants contrary to the purposes of the Act and the specific provisions of § 918 to ensure quick payment of defaulted amounts. *See Providence*, 765 F.2d at 1386.

Essentially then, the Board failed to acknowledge the distinction between appeals of compensation orders and proceedings relating to compensation orders that are not direct appeals of the underlying compensation orders, but are "application[s] for a supplementary order declaring a default in the payment of compensation under § [9]18(a). . . ." *Bray v. Director, OWCP*, 664 F.2d 1045, 1047 (5th Cir. 1981). "Such a deficiency is distinct from an error of fact or law, which must be asserted within 30 days after the filing of a compensation order." *Id.* (citing § 921(a)). Given the undisputed record that Aetna paid Ms. Snowden pursuant to the 1992 compensation order on the basis that she was entitled to the benefit of the catch-up adjustments, the fact that § 910(f) was not explicitly mentioned in the 1992 compensation order is not dispositive of the jurisdictional issue. The reference was implicit in light of *Brandt/Holliday*, and for years Aetna paid without challenging OWCP's methodology for calculating Ms. Snowden's compensation rate. When Aetna did challenge the methodology, it relied on the Board's decision in *Bailey*, which acknowledged a change of law in ruling that the *Brandt/Holliday* rule "no longer applies to cases arising under the [ ] Act." *Bailey*, 1998 WL 285563, at *4.

Finally, although Ms. Snowden and OWCP ask the court to address whether *Brandt/Holliday* is still law in this circuit, we decline to do so in view of our holding that the Board lacked jurisdiction to review the supplementary compensation order. Once the court has determined that the agency did not have jurisdiction to act, the court has declined to consider the merits of contentions that the agency erred. *See, e.g., Stoddard v. Board of Governors of the Fed. Reserve Sys.*, 868 F.2d 1308, 1312 (D.C. Cir. 1989); *see also Synovus Fin. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 952 F.2d 426, 428 (D.C. Cir. 1991); *Seatrain Lines, Inc. v. Federal Maritime Comm'n*, 460 F.2d 932, 949 (D.C. Cir. 1972), *aff'd*, 411 U.S. 726 (1973). In view of our practice, which is binding absent *en banc* review, the court has no occasion to decide whether it has jurisdiction to reach the substantive contentions. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).[11]

Accordingly, because the Benefits Review Board lacked jurisdiction to review the 1998 supplementary compensation order issued pursuant to § 918(a), we vacate the November 15, 1999 decision and order of the Board.

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[11] The court, therefore, also does not reach Ms. Snowden's contentions that any modification to *Brandt/Holliday* be prospective, and that the Board erred in ruling that the lower compensation rates should be applied as of the date of *Bailey*. The court likewise does not reach OWCP's contentions that the Board misread *Brandt*, that this court should overrule *Brandt*, and that, in any event, Aetna waived any objection to the application of *Brandt* by failing timely to raise its objection.

APPENDIX B

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 99-0245

Not-Published

Florence Snowden Claimant-Respondent	)	
v.	)	
Washington Hospital Center	)	
and	)	
Aetna Casualty & Surety Company (now known as Travelers Property Casualty)	)	Date Issued: June 30, 2000
Employer/Carrier-Petitioners	)	
Director, Office of Workers' Compensation Programs, United States Department of Labor	)	
Party-in-Interest	)	Decision and Order on Reconsideration

Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of the Act of Charles L. Green, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Richard W. Galiher, Jr. (Galiher, Clarke & Galiher), Rockville, Maryland, for claimant.

Roger S. Mackey, Chantilly, Virginia, for employer/carrier.

Joshua T. Gillelan II (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant and the Director, Office of Workers' Compensation Programs (the Director), have filed timely motions for reconsideration of the Board's November 15, 1999, decision in the captioned case, wherein the Board reversed the district director's order that employer pay compensation inclusive of annual adjustments pursuant to Section 10(f) in accordance with *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981). 20 C.F.R. §802.407. Employer responds, urging the rejection of these motions. For the reasons discussed below, we deny the motions for reconsideration.[1]

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[1] As a result of errors in service by the parties, the Board did not receive briefs from either claimant or the Director prior to its initial decision in this case. In order to rectify any error in this regard, we will discuss each argument raised by these parties on reconsideration.

To recapitulate the relevant facts in this case, claimant sustained a back injury while working as a psychiatric nurse for employer on September 7, 1978. On March 18, 1992, Administrative Law Judge Charles P. Rippey awarded claimant continuing permanent total disability benefits from December 18, 1990, medical benefits, and interest, as well as any periodic increases to which claimant may be entitled under the Act.[2] The administrative law judge's decision however did not set the compensation rate, and, in particular did not order that cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), be paid in accordance with the *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir. 1986), and *Holliday* decisions.

Acting on claimant's claim for an assessment of additional compensation pursuant to Section 14(f), 33 U.S.C. §914(f), the district director, by Order dated October 16, 1998, formally set out, for the first time, a determination that the compensation rate is to include annual adjustments pursuant to Section 10(f) in accordance with *Holliday*.[3] He therefore concluded, based on his finding that employer was not making disability payments at the proper rate, that employer was in default in the compensation owed claimant in the amount of $3,580.68. In addition, the district director held employer liable for a penalty

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[2] Employer's request for Section 8(f) relief, 33 U.S.C. §908(f), was ultimately denied by the administrative law judge and that denial was affirmed by the Board. *Snowden v. Washington Hospital Center*, BRB No. 95-2125 (Dec. 9, 1996)(unpub.).

[3] In *Holliday*, the United States Court of Appeals for the Fifth Circuit held that claimants, upon becoming permanently totally disabled, are entitled to intervening percentage increases reflecting annual cost-of-living adjustments pursuant to Section 10(f) that accrued during any earlier period of temporary total disability. *Holliday*, 654 F.2d at 417, 421-423, 13 BRBS at 741-742, 746-747.

of 20 percent of the amount in default ($716.14) pursuant to Section 14(f).

On appeal, the Board held that, in accordance with *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998), claimant is entitled to annual adjustments pursuant to Section 10(f) at a rate including only those adjustments occurring after she became permanently totally disabled. Accordingly, the district director's order that employer pay compensation inclusive of annual adjustments pursuant to Section 10(f) in accordance with *Holliday* was reversed. *Snowden,* slip op. at 4.

In his motion for reconsideration, the Director asserts that the district director's order for which review was sought was a "Supplementary Compensation Order" entered pursuant to Section 18(a) of the Act, 33 U.S.C. §918(a), which is reviewable only by a district court and thus is not within the jurisdiction of the Board under Section 21 of the Act, 33 U.S.C. §921. The Director therefore requests that the Board now dismiss employer's appeal for lack of jurisdiction. The Director further contends that if the Board did have jurisdiction over employer's appeal, the law of the case doctrine precludes application of the Board's decision in *Bailey.* The Director avers that employer herein accepted the administrative view regarding *Brandt,* embodied in the district director's calculation worksheet dated April 27, 1992,[4] after the administrative law judge's award was originally filed, and again when the continuing liability for permanent total disability reverted to it

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[4] In this regard, the Director also argues that the Board's prior decision is in error because it did not have the complete administrative file before it. He has, on reconsideration, provided the Board with more documents, including the district director's calculation worksheet and correspondence between the parties regarding employer's obligation under *Holliday.* While these additional documents indicate that employer initially paid benefits, without protest, under *Holliday,* they have no dispositive impact on the Board's ability to render a decision in this case.

upon the denial of Section 8(f) relief; thus, the Director maintains that employer did not raise the applicability of *Brandt/Holliday* in a timely fashion. Moreover, the Director argues that the Board's decision in *Ryan v. Lane & Co.*, 28 BRBS 132 (1994), supports its position in the instant case. Lastly, the Director urges the Board to revisit its decision in *Bailey* and recognize that *Brandt* is still controlling law in D.C. Act cases. For the most part, claimant's contentions on reconsideration mirror those raised by the Director. Claimant, however, also argues that if *Bailey* is applicable to this case, it must be read so as to allow employer to adjust benefits only in a prospective manner.

In *Bailey,* the employer had voluntarily paid the claimant temporary total disability benefits since 1982, and paid the claimant permanent total disability benefits in accordance with an administrative law judge's 1992 award. In 1996, a dispute arose between the employer and the district director concerning Section 10(f) adjustments. After various correspondence over the next year, the district director ultimately issued an order holding employer liable for a Section 14(f) penalty for failure to pay claimant at a rate inclusive of Section 10(f) adjustments calculated pursuant to *Holliday.* Employer timely appealed this order to the Board. The Board held that due process required that it address the Section 10(f) issue raised by employer as employer's appeal presented its first opportunity to challenge the computation of the cost-of-living adjustment pursuant to *Holliday. Bailey,* 32 BRBS at 77. The administrative law judge had not ordered that Section 10(f) adjustments be calculated pursuant to *Holliday,* and the district director had not issued any prior orders addressing the issue. The Board therefore addressed the merits of employer's argument concerning the continued validity of *Holliday* in cases arising under the D.C. Act.

In the instant case, the administrative law judge, in his Decision and Order -- Award of Benefits dated March 18, 1992, found claimant entitled to permanent total disability benefits from December 18, 1990, "including periodic increases to which she may be entitled under the Act." Thereafter, the district director sent a letter dated April 27, 1992, to the Director outlining employer's liability for benefits. In that document, the district director made reference to the "Holiday [*sic*] Decision," noting that "claimant is not entitled to an annual cost of living adjustment until December 18, 1990, which is the date the claimant was found to be permanently and totally disabled," and that claimant would thus be entitled to cost-of-living adjustments at a rate inclusive of adjustments that occurred during the time that claimant was temporarily totally disabled, *i.e.*, from September 7, 1977, through December 18, 1991. Accordingly, the district director noted that pursuant to *Holliday*, on December 18, 1990, the compensation rate increased from $192.80 to $357.80. There is no evidence that this document was submitted to employer; however employer did pay benefits at this increased compensation rate. In June 1998, a dispute arose between employer and the district director regarding Section 10(f) adjustments. Specifically, following the issuance of the Board's decision in *Bailey*, employer, on June 15, 1998, recalculated the compensation rate without reference to the *Holliday* decision, and accordingly, began paying benefits at a diminished rate, *i.e.*, $237 per week, as opposed to $438 per week pursuant to *Holliday*, between June 15, 1998, and September 30, 1998, and then $247 per week, as opposed to $457 per week pursuant to *Holliday*, thereafter. In 1998, upon claimant's motion, the district director issued the order holding employer liable for a Section 14(f) penalty for failure to pay claimant at a rate inclusive of Section 10(f) adjustments calculated pursuant to *Holliday*, from which employer timely appealed.

In its decision in the instant case, the Board stated that, as in *Bailey*, the administrative law judge did not order the calculation of Section 10(f) adjustments pursuant to *Brandt/Holliday*, nor did the district director issue any compensation orders concerning Section 10(f) prior to the order assessing the Section 14(f) penalty.[5] Employer may have had notice regarding *Holliday*, but there is no formal order memorializing its application prior to that at issue in this appeal. Thus, the Board properly applied *Bailey* in holding that it had jurisdiction over the district director's order in this case, as that order represented the first opportunity for employer to challenge the district director's calculation of Section 10(f) adjustments under *Holliday*.

In this regard, the Director's assertion that the appealed order is a Section 18(a) default order not subject to Board review is without merit. Section 18(a), in pertinent part, states:

> In the case of default by the employer in *the payment of compensation due under any award of compensation* for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the [district director] making the compensation order [f]or a supplementary order declaring the amount of the default.

33 U.S.C. §918(a) (emphasis added). As noted above, in the instant case there was never a formal determination by the administrative law judge or the district director ordering employer to pay compensation under the *Holliday* formula. Thus, the alleged default by the employer in this case, *i.e.*,

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[5] While it is true that the district director's calculation sheet explicitly discussed the application of *Holliday*, there is no precedent for holding that a calculation sheet is tantamount to an appealable order.

amounts due under *Holliday,* was not "compensation due under any award of compensation" pursuant to Section 18(a). Contrary to the Director's position, the supplementary order by the district director represents an original adjudication of the *Brandt/Holliday* issue which is subject to review by the Board. Moreover, the appealed order states that the claim filed by claimant was "for assessment of additional compensation pursuant to Section 14(f) of the Act." In contrast, as the Board noted in its decision in this case, *Snowden,* slip op. at 4 n.4, the subsequent order issued by the district director was a default order over which the Board has no jurisdiction.

Additionally, neither the administrative law judge nor the Board, in its prior decisions in this case, addressed the applicability of *Holliday. Snowden v. Washington Hospital Center,* BRB Nos. 92-1453/A (June 28, 1994)(unpub.), BRB No. 95-2125 (Dec. 9, 1996)(unpub). Thus, contrary to the Director's assertion, the law of the case doctrine does not apply. Moreover, the Board's decision in *Ryan,* 28 BRBS at 132, is clearly distinguishable from the instant case, as well as from *Bailey,* inasmuch as in that case there was an explicit award by the administrative law judge of annual cost of living adjustments on the award of permanent total disability compensation pursuant to Section 10(f) in accordance with *Holliday.*[6] We therefore reject the Director's contentions, first that the appealed order in the instant case is not subject to

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[6] In *Ryan,* the administrative law judge characterized employer's request to adjust claimant's benefits under *Phillips v. Marine Concrete Structures, Inc.,* 895 F.2d 1033, 23 BRBS 36(CRT)(5th Cir. 1990)(*en banc*), as a motion for modification since the prior decision applying *Holliday* was final. The administrative law judge rejected employer's motion, as Section 22 of the Act, 33 U.S.C. §922, does not apply to an issue involving a legal interpretation which is decided against a party. The Board affirmed the administrative law judge's determinations as being in accordance with law.

review by the Board, and second, that *Bailey* is distinguishable from the instant case, as they lack merit.

Similarly, we reject the Director's contention that the Board's holding in *Bailey* is erroneous. As the Board stated in *Bailey,* the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Brandt* stated, "In sum, we accept the *Holliday* ruling as the proper reading of the statute in this circuit *at least until the precedent is overruled in the Fifth Circuit,* or the Director publicly announces that, prospectively, he will seek to apply this current interpretation evenhandedly to all similarly disabled claimants in all circuits." *Brandt,* 785 F.2d at 332, 18 BRBS at 78(CRT)(emphasis added). The Board thus observed that the *Brandt* court did not state that it would follow *Holliday* until the D.C. Circuit overruled it but rather until it was overruled by the Fifth Circuit. *Bailey,* 32 BRBS at 77. The Board then addressed *Phillips v. Marine Concrete Structures, Inc.,* 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), wherein the Fifth Circuit overruled its decision in *Holliday* and adopted *the new position of the Director* that there shall be no Section 10(f) adjustments for periods of temporary total disability,[7] adding that this position was the posture taken by the Board, except in

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[7] In overruling *Holliday,* the Firth Circuit in *Phillips* concluded that the language of Section 10(f) is plain and unambiguous that the annual adjustments are to be paid only to permanent total disability benefits. *Phillips,* 895 F.2d at 1035, 23 BRBS at 38(CRT). Moreover, although the court stated that resort to legislative history is unnecessary "where the statute is so lucid," it nonetheless noted that, with regard to Section 10(f), Congress intended to provide for upgrading benefits in future years in cases of permanent total disability and had rejected a version of Section 10(f) providing for annual adjustments to all compensation, whether partial or total, temporary or permanent. *Phillips,* 895 F.2d at 1035 n.3, 23 BRBS at 38 n.3(CRT). Thus, the Fifth Circuit held that claimants are not entitled to Section 10(f) annual adjustments during previous periods of temporary total disability.

cases arising in the Fifth and D.C. Circuits. *Phillips*, 895 F.2d at 1035, 23 BRBS at 38(CRT); *see, e.g., Scott v. Lockheed Shipbuilding & Const. Co.*, 18 BRBS 246 (1986).

In *Bailey*, the Board therefore concluded that as *Holliday* has been overruled by the Fifth Circuit, the condition precedent set by the D.C. Circuit has been satisfied, and thus *Holliday* no longer applies to cases arising under the D.C. Act. It is indisputable that the D.C. Circuit, in *Brandt*, elected to follow *Holliday "at least until the precedent is overruled in the Fifth Circuit,"* and that said precedent was overruled by the Fifth Circuit in *Phillips*. Second, the court in *Brandt* stated that it was reluctant to reject *Holliday* and therefore create a split in the circuits. *Id.*, 785 F.2d at 332, 18 BRBS at 77(CRT). A continued application of *Holliday* in the D.C. Circuit subsequent to *Phillips* would perpetuate such a split in the circuits, particularly given that the United States Courts of Appeals for the Second and Ninth Circuits have subsequently adopted the holding in *Phillips*.[8] *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT)(9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT)(2d Cir. 1990). Moreover, the Director's litigating position in *Brandt*,[9]

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[8] The Eleventh Circuit still adheres to *Holliday*. In *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), the court stated it is bound by all decisions issued by the Fifth Circuit prior to October 1, 1981, when the Eleventh Circuit was created, unless the Eleventh Circuit, in an *en banc* decision, overrules the precedent. The Eleventh Circuit subsequently reaffirmed this position, and declined to grant rehearing *en banc* on this issue. *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140(CRT), *reh'g en banc denied*, 132 F.3d 48 (11th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

[9] In *Brandt*, the Director argued that the holding of *Holliday* is contrary to law, and urged the D.C. Circuit to accept the application ultimately adopted by the Fifth Circuit in *Phillips*. In fact, the record in that case contained documentation indicating that prior to *Phillips*, the Director intended to challenge the applicability of *Holliday* in cases arising in all but the Fifth Circuit.

Phillips, Bowen and *Lozada* clearly indicates the Director's intent "to apply this current interpretation [*i.e.*, that *Holliday* is contrary to law and thus, that annual adjustments are to be paid only to permanent total disability benefits] evenhandedly to all similarly disabled claimants in all circuits," *Brandt,* 785 F.2d at 332, 18 BRBS at 78 (CRT), and thus, the second condition precedent set by the D.C. Circuit in *Brandt* has been met. The Director is in a poor position to argue now that the *Holliday* decision should be followed. Thus, we reaffirm the Board's decision that *Holliday* is no longer to be followed in cases arising under the D.C. Act.

Lastly, we address claimant's contention that the holding in *Bailey* should not be retroactively applied in this case. The Fifth Circuit, in *Phillips*, discussed this issue. After noting the general rule that judicial decisions are given retroactive effect, *Salem v. Stumes,* 465 U.S. 638, 642 (1984), the Fifth Circuit set out the test, enunciated by the Supreme Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), that must be met before a new decision can be applied nonretroactively.

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed.... Second, ... 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'.... Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'

Phillips, 895 F.2d at 1036, 23 BRBS at 39(CRT), citing *Chevron,* 404 U.S. at 106-07 (citations omitted). The Fifth Circuit then held that claimant met the first part of the test, that the verdict on the second inquiry is neutral, but that claimant could not show the requisite "injustice or hardship," particularly in view of the District's promise not to seek disgorgement of past benefits. *Phillips,* 895 F.2d at 1036, 23 BRBS at 39(CRT). The Fifth Circuit therefore concluded that Phillips did not meet his burden, under *Chevron,* of entitlement to an exception to the presumption of retroactivity. The Fifth Circuit concluded that "future payments may be adjusted to the amount that would have been calculated absent the *Holliday* formula although no refund of past excess payments made pursuant to *Holliday* shall be required." *Id.*

In the instant case, the Board did not establish a new principle of law; rather it followed the precedent set in *Bailey,* which did establish a new principle of law regarding the applicability of *Holliday* to D.C. Act cases. Consequently, claimant, in the instant case, has not met the first prong of the *Chevron* test and thus, has not established entitlement to an exception to the presumption of retroactivity. In keeping with *Phillips,* however we hold that payments subsequent to the issuance of *Bailey,* may be adjusted to the amount that would have been calculated absent the *Holliday* formula, as employer has done in this case commencing with its payment on June 15, 1998. *See Phillips,* 895 F.2d at 1036, 23 BRBS at 39(CRT).

Accordingly, claimant's and the Director's motions for reconsideration are denied. 20 C.F.R. §802.409. The Board's prior Decision and Order is affirmed in all respects.

SO ORDERED.

/s/ Betty Jean Hall

BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Malcolm D. Nelson

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

APPENDIX C

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 99-0245

Not-Published

Florence Snowden Claimant-Respondent	)	
v.	)	
Washington Hospital Center	)	
and	)	
Aetna Casualty & Surety Company (now known as Travelers Property Casualty)	)	Date Issued: November 15, 1999
Employer/Carrier-Petitioners	)	
Director, Office of Workers' Compensation Programs, United States Department of Labor	)	
Party-in-Interest	)	Decision and Order

Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of the Act of Charles L. Green, District Director, Office of Workers' Compensation Programs, United States Department of Labor.

Roger S. Mackey, Chantilly, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplementary Compensation Order Awarding 20 Percent Additional Compensation Pursuant to Section 14(f) of the Act (No. 40-134355) of District Director Charles L. Green rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (1982)(the Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973)(the D.C. Act). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting).

Claimant sustained a back injury while working as a psychiatric nurse for employer on September 7, 1978. On March 18, 1992, Administrative Law Judge Charles P. Rippey awarded claimant permanent total disability benefits from December 18, 1990, medical benefits, and interest, as well as any periodic increases to which claimant may be entitled under

the Act.[1] The administrative law judge's decision, however, did not set the compensation rate, and, in particular, did not order the cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), be paid in accordance with the *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73(CRT)(D.C. Cir. 1986), and *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), decisions.

Acting on claimant's claim for an assessment of additional compensation pursuant to Section 14(f), 33 U.S.C. §914(f), the district director, by Order dated October 16, 1998, formally set out, for the first time, a determination that the compensation rate is to include annual adjustments pursuant to Section 10(f) in accordance with *Holliday*.[2] He therefore concluded, based on his finding that employer was not making disability payments at the proper rate, that employer was in default in the

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[1] The administrative law judge also granted employer's request for Section 8(f) relief, 33 U.S.C. §908(f). The Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's Section 8(f) determination, and employer cross-appealed the administrative law judge's award of permanent total disability benefits. In its decision dated June 28, 1994, the Board affirmed the award of permanent total disability benefits, vacated the finding that employer is entitled to Section 8(f) relief, and remanded for further consideration of that issue in accordance with the Administrative Procedure Act. *Snowden v. Washington Hospital Center*, BRB Nos. 92-1453/A (June 28, 1994)(unpub.). On remand, the administrative law judge denied employer's request for Section 8(f) relief. The administrative law judge's denial of Section 8(f) relief was affirmed by the Board in a decision dated December 9, 1996. *Snowden v. Washington Hospital Center*, BRB No. 95-2125 (Dec. 9, 1996)(unpub.).

[2] In *Holliday*, the United States Court of Appeals for the Fifth Circuit held that claimants, upon becoming permanently totally disabled, are entitled to intervening percentage increases reflecting annual cost-of-living adjustments pursuant to Section 10(f) that accrued during any earlier period of temporary total disability. *Holliday*, 654 F.2d at 417, 421-423, 13 BRBS at 741-742, 746-747.

compensation owed claimant in the amount of $3,580.68. In addition, the district director held employer liable for a penalty of 20 percent of the amount in default ($716.14) pursuant to Section 14(f).[3]

Employer appeals, contending that, pursuant to the Board's decision in *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998), the holdings in *Brandt* and *Holliday* are no longer controlling authority in cases arising under the D.C. Act. Neither claimant nor the Director has filed a response brief.

In *Bailey*, 32 BRBS at 76, the Board addressed the very issue raised by employer in the instant case. Initially, the Board held that as the administrative law judge did not specifically order the calculation of Section 10(f) adjustments pursuant to *Brandt/Holliday*, and the district director did not issue any compensation orders concerning Section 10(f) prior to the assessment of the Section 14(f) penalty, employer's appeal represented the earliest opportunity for employer to challenge the Section 10(f) calculation. *Bailey*, 32 BRBS at 76. The Board further noted that no party challenged the propriety of employer's appeal, which involved strictly a legal issue. Accordingly, the Board determined that it had jurisdiction to consider employer's appeal. The Board then held, after a review of the relevant case law issued since *Holliday*, that the district director erroneously ordered employer to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday*, as that decision no longer stands as valid precedent.

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[3] Section 14(f) provides that compensation payable under the terms of an award must be paid within 10 days after it is due; if it is not timely paid employer is liable for an assessment in the amount of 20 percent of the unpaid compensation. As the district director determined that claimant should have received $7,802.20 from employer based on *Holliday* but only received $4,221.52, a difference of $3,580.68, the district director ordered employer to pay both the deficiency and a 20 percent penalty thereof.

Bailey, 32 BRBS at 77-79. Specifically, the Board held that as the United States Courts of Appeals for the District of Columbia Circuit in *Brandt* accepted the *Holliday* ruling as the proper reading of the statute in that circuit *"at least until the precedent is overruled in the Fifth Circuit," Brandt*, 785 F.2d at 332, 18 BRBS at 78 (CRT)(emphasis added), and that inasmuch as the Fifth Circuit, in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*), overruled its decision in *Holliday* and adopted the new position of the Director that there shall be no Section 10(f) adjustments for periods of prior temporary total disability, *Holliday* no longer applies to cases arising under the D.C. Act. *Bailey*, 32 BRBS at 77-79.

For the reasons discussed in *Bailey*, due process requires that we decide the Section 10(f) issue raised by this appeal as this is employer's first opportunity to challenge the underlying basis for the imposition of the Section 14(f) penalty, *i.e.*, the Section 10(f) calculation pursuant to *Brandt/Holliday*. *Bailey*, 32 BRBS at 77-78. Moreover, in accordance with *Bailey*, we hold that claimant is entitled to annual adjustments pursuant to Section 10(f) at a rate including only those adjustments occurring after she because permanently totally disabled. *Id.* at 78-79. The district director's order that employer pay compensation inclusive of annual adjustments pursuant to Section 10(f) in accordance with *Holliday* is therefore reversed.[4]

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[4] In the instant case, claimant subsequently applied to the district director for a supplementary compensation order, contending that although employer paid the compensation owed, it did not pay the Section 14(f) penalty. The district director investigated the claim, and thereafter issued an order declaring employer in default. As the Section 14(f) penalty has not been paid and a default order has issued, the Board lacks jurisdiction to address the propriety of the penalty. 33 U.S.C. §918(a); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT)(3d Cir. 1994), *aff'g* 27 BRBS

Accordingly, the award of additional benefits in the District Director's Supplementary Compensation Order is reversed.[5]

SO ORDERED.

/s/ Betty Jean Hall

BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Malcolm D. Nelson

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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260 (1993); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1219, 18 BRBS 60, 62-63 (CRT)(5th Cir. 1985); *Providence Washington Insurance Co. v. Director, OWCP [Kain]*, 765-F.2d 1381, 1386, 17 BRBS 135, 139(CRT)(9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 129, 16 BRBS 10, 12-13 (CRT)(5th Cir. 1983).

[5] We note that the district director is not free to disregard the Board's decision in *Bailey*. *See generally Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897 (D.C. Cir. 1997)(discussing *stare decisis*).

APPENDIX D

U.S. Department of Labor

Benefits Review Board
800 K Street, NW
Washington, DC 20001-8001

BRB No. 95-2125

Not-Published

Florence Snowden Claimant	)	
v.	)	
Washington Hospital Center	)	
and	)	
Aetna Casualty & Surety Company	)	Date Issued: December 9, 1996
Employer/Carrier- Petitioners	)	
Director, Office of Workers' Compensation Programs, United States Department of Labor	)	
Respondent	)	Decision and Order

Appeal of the Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Roger S. Mackey (Law Offices of Conrad A. Fontaine), Fairfax, Virginia, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor, Samuel Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand (88-DCW-0086) of Administrative Law Judge Charles P. Rippey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. Claimant sustained injuries to her back while working for employer. In its initial Decision and Order, the Board affirmed the administrative law judge's award of permanent total disability compensation to claimant, vacated the administrative law judge's finding that employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), since that determination did not comply with the Administrative Procedure Act, and remanded

the case to the administrative law judge for reconsideration of the Section 8(f) issue. *Snowden v. Washington Hospital Center*, BRB Nos. 92-1453/A (June 28, 1994)(unpub.).

In his Supplemental Decision and Order on Remand, the administrative law judge denied employer's request for relief pursuant to Section 8(f), finding that employer failed to establish the contribution and manifest elements necessary for such relief to be granted. Employer's motion for reconsideration was subsequently denied.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 34 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that the total disability is caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT)(D.C. Cir. 1994); *Dominey v. Arco Oil and Gas Co.*, 30 BRBS 134 (1996).

After review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *see Jaffe New York Decorating*, 25 F.3d at 1085, 28 BRBS at 35 (CRT). Specifically, we agree with the Director that there is no record evidence sufficient to support a finding of Section 8(f) contribution in this case. Contrary to employer's contention, the opinion of Dr. Moskovitz, while supportive of a finding that claimant's present condition is related to a combination of her pre-existing lupus and her job injury, does not establish that claimant's total disability is not solely the result of her work injury.[1] Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, we affirm that finding and consequently his denial of Section 8(f) relief in this case. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand is affirmed.

SO ORDERED.

/s/ Betty Jean Hall

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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[1] Dr. Moskovitz opined "[y]es, I believe that, within a reasonable medical certainty, because she has lupus, her present level of functioning is worse than if she didn't have lupus." Depo. at 37.

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Regina C. McGranery

REGINA C. McGRANERY
Administrative Appeals Judge

APPENDIX E

U.S. Department of Labor

Benefits Review Board
800 K Street, NW
Washington, DC 20001-8001

BRB Nos. 92-1453
92-1453A

Not-Published

Florence Snowden Claimant-Respondent	)	
v.	)	
Washington Hospital Center	)	
and	)	
Aetna Casualty & Surety Company	)	Date Issued: June 28, 1994
Employer/Carrier-Respondents Cross-Petitioners	)	
Director, Office of Workers' Compensation Programs, United States Department of Labor	)	
Petitioner Cross-Respondent	)	Decision and Order

Appeal of the Decision and Order -- Award of Benefits of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Roger S. Mackey (Law Offices of Conrad A. Fontaine), Fairfax, Virginia, for employer/carrier.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and employer cross-appeals the Decision and Order -- Award of Benefits (88-DCW-0086) of Administrative Law Judge Charles P. Rippey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 (1982) *et seq.*, as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501 *et. seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On September 7, 1978, claimant injured her lower back while lifting a patient during the course of her employment for employer as a psychiatric nurse. After receiving conservative treatment, claimant returned to work for employer in early 1979. Claimant continued to work until May 1979, at which time she injured her calf muscle and her back began hurting

worse than it had previously. Claimant again returned to work although her back condition continued to wax and wane. In November 1987, claimant's back conditioned worsened, and she ultimately underwent a laminectomy and spinal fusion. Shortly thereafter, she underwent additional surgery to alleviate compression of her spinal nerves caused by cauda equina syndrome. A second laminectomy and spinal fusion were performed in May 1989. In December 1991, claimant's treating physician, Dr. Moskovitz, diagnosed a herniated disc at L5/S1, and pseudarthrosis. Employer voluntarily paid claimant temporary total disability compensation from 1988 until the time of the hearing. 33 U.S.C. §908(b). Claimant sought permanent total disability compensation commencing December 1990. *See* 33 U.S.C. §908(a).

The administrative law judge found that it was undisputed that claimant was unable to return to her prior work for employer as a psychiatric nurse. The administrative law judge further determined that claimant was entitled to permanent total disability compensation commencing December 18, 1990, inasmuch as employer had not met its burden of establishing suitable alternate employment based on the four home-bound positions identified by its vocational expert, Kathleen Sampeck. Finally, the administrative law judge awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, the Director challenges the award of Section 8(f) relief, arguing that the administrative law judge failed to explicitly identify, discuss, and weigh the relevant evidence in violation of the Administrative Procedure Act, 5 U.S.C. §557(c). Employer responds, urging affirmance. Employer cross-appeals the award of permanent total disability compensation. Claimant has not responded to this appeal.

Employer's argument that the administrative law judge erred in awarding claimant permanent total disability

compensation is rejected. To establish a *prima facie* case of total disability, claimant must show that she cannot return to her regular or usual employment due to a work-related injury. If claimant meets this burden, employer must establish the existence of realistically available job opportunities within the geographical area where claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. *See generally Director, OWCP v. Berktresser,* 921 F.2d 306, 311-312, 24 BRBS 69, 73 (CRT)(D.C. Cir. 1990); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140, 145 (1992): *see also Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988).

Initially, we reject employer's contention that in awarding claimant benefits for permanent total disability, the administrative law judge misconstrued Dr. Moskovitz's opinion as indicating that claimant was not capable of any employment. In his Decision and Order, the administrative law judge correctly noted that although Dr. Moskovitz initially expressed the opinion that claimant was not employable, he subsequently indicated that claimant was capable of working at home on a flexible schedule. Decision and Order at 3. Moreover, we note that the administrative law judge's consideration of suitable alternate employment was clearly premised on the assumption that claimant was capable of home-bound employment.

We also find no merit to employer's argument that the administrative law judge erred in finding that the jobs identified by its vocational expert, Ms. Sampeck, were not sufficient to meet employer's burden of establishing the availability of suitable alternate employment. After initially interviewing claimant in December 1990 and considering the home-bound employment restriction described in both Dr. Moskovitz's

January 8, 1992, deposition and the January 4, 1992, opinion of Dr. Gordon, Ms. Sampeck conducted a labor market survey on January 21, 1990. As a result of this survey, Ms. Sampeck identified four opportunities for homebound work which she considered suitable for claimant. The jobs identified included an appointment-setter position with Northwestern Mutual Insurance Company in Arlington, Virginia, a telemarketer position with United Business Machines in Lorton, Virginia, a telecom representative position with One Stop Financial in Damascus, Maryland, and a telemarketer position with Fiber Clean, a rug cleaning service located in Rockville, Maryland.

After considering employer's vocational evidence, the administrative law judge found that the position identified with Northwestern Mutual Insurance Company was not realistically available to someone with claimant's limitations. In so concluding, the administrative law judge credited claimant's testimony that when she attempted to follow up on this job lead by phoning Northwestern, she was informed that they did not have anything for anyone to do at home. Although Ms. Sampeck attempted to explain this occurrence by testifying that the work actually would have been with an agent named Robertson, with whom she was personally acquainted, and not with Northwestern, the administrative law judge found that this discrepancy cast doubt on Ms. Sampeck's credibility. The administrative law judge further determined that the fact that the job had not been identified until the day prior to the hearing gave it the "feel of a hurried muster to do something before trial." *See* Decision and Order at 3. Finally, the administrative law judge concluded that this job was truly sheltered employment and also discredited this position based on the fact that the requirements of the job had not been presented to Dr. Moskovitz.

The administrative law judge similarly found that the telemarketer position identified with United Business Machines

of Lorton was not realistically available to someone with claimant's limitations. This finding was based on claimant's testimony that when she called to inquire about this job, she was told that the work must be done in the office, and that there was no work available for people to perform at home.

The administrative law judge also found that the job with One Stop Financial of Damascus, Maryland, soliciting customers for AT&T long distance services would not suffice. Crediting claimant's testimony that when she attempted to call this company she was unable to obtain a telephone number either in the phone book or from directory assistance, the administrative law judge in essence found that employer had not established the availability of this job. Finally, the administrative law judge found that as the job identified with Fiber Clean setting up appointments for carpet cleaning services required a training period of at least two weeks in Rockville, which would be precluded by claimant's physical condition, this job was not reasonably available to claimant.

After careful review of the record, we affirm the administrative law judge's finding that employer did not meet its burden of establishing the availability of suitable alternate employment, because it is rational and supported by substantial evidence. *See Caudill v. Sea Tac Alaska Shipbuilding Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. See Tac Alaska Shipbuilding, Inc. v. Director, OWCP*, No. 91-70743 (9th Cir. Sept. 17, 1993). Employer argues that the administrative law judge erred in finding that the job identified with Northwestern was sheltered employment. We hold that any error the administrative law judge may have made in this regard is harmless inasmuch as the administrative law judge, in rejecting this position, also relied on the fact that Ms. Sampeck, who identified Northwestern initially as the employer subsequently changed her testimony, the fact that when claimant called Northwestern she was informed that they had no home-bound

work available, and the fact that the job was not identified until the day prior to the hearing.

Employer's argument that the administrative law judge erred in rejecting the job at United Business Machines based on claimant's testimony that the company had informed her that no home-bound work was available similarly must fail. Although employer asserts that this was error because the fact that the work was not available when claimant called and inquired does not necessarily mean that the work was not available at the time it was identified, we disagree. In the present case, we hold that the administrative law judge reasonably inferred from claimant's testimony that inasmuch as United Business Machines did not offer home-bound work, this job was not realistically available to claimant given her physical limitations.

Finally, we reject employer's argument that none of the positions identified was beyond claimant's physical restrictions. We note that since neither Northwestern nor United Business Machines offered home-bound work, these jobs are not suitable for claimant as a matter of law. We further note that the administrative law judge reasonably viewed the Fiber Clean position as not suitable for claimant based on the fact that it required a two week training period outside of the home which claimant was incapable of performing. As employer has failed to raise any reversible error made by the administrative law judge in evaluating the evidence and making credibility determinations, the award of permanent total disability compensation is affirmed. *See Uglesich v. Stevedoring Services of America,* 24 BRBS 180, 183 (1991).

We now direct our attention to the Director's appeal of the administrative law judge's award of Section 8(f) relief. Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks in a case of permanent total disability where an employee suffers from a manifest pre-existing permanent

partial disability which combines with the work injury to result in the employee's permanent total disability; the permanent total disability must not be due solely to the work injury. 33 U.S.C. §908(f); *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175 (4th Cir. 1993). In order to constitute a pre-existing permanent partial disability, the pre-existing condition must be a serious, lasting physical problem. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 17 BRBS 146 (CRT)(D.C. Cir. 1985). Employer bears the burden of proving that the disability was in part caused by the pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). In order to satisfy the manifest requirement, employer must have had actual knowledge of the pre-existing disability, or constructive knowledge from medical records in existence from which the condition was objectively determinable. *See generally Berkstresser*, 921 F.2d at 310-311, 24 BRBS at 71-72 (CRT).

We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be upheld because he did not adequately detail the evidence upon which he relied or the reasoning he employed in making the award. In the instant case, the administrative law judge's discussion of Section 8(f) consists solely of the following:

> The claimant's injury to her back was exacerbated by her pre-existing lupus erythematosus. The medical evidence to this effect in the record is uncontradicted.

Decision and Order at 7.

Because the administrative law judge failed to identify, weigh and discuss the relevant evidence and failed to identify the evidentiary basis for his conclusions, as is required by the

Administrative Procedure Act, 5 U.S.C. §557, we vacate the award of Section 8(f) relief. On remand the administrative law judge must explicitly identify, discuss, and weigh the relevant evidence under the appropriate legal standard in accordance with the requirements of the Administrative Procedure Act. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-383 (1990); *Caims v. Matson Terminals, Inc.*, 21 BRBS 252 (1980).[1]

Accordingly, the administrative law judge's Decision and Order is affirmed insofar as it relates to the award of permanent total disability compensation. The award of Section 8(f) relief contained therein, however, is vacated, and the case is remanded for further consideration of this issue consistent with this opinion.

SO ORDERED.

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ James F. Brown

JAMES F. BROWN
Administrative Appeals Judge

/s/ Regina C. McGranery

REGINA C. McGRANERY
Administrative Appeals Judge

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[1] By Order dated April 16, 1993, the Board held the Director's motion for summary reversal of the administrative law judge's award of Section 8(f), 33 U.S.C. §908(f), relief in abeyance pending the issuance of this Decision and Order. Given our decision to remand the case for reconsideration of Section 8(f) relief, the Director's motion is denied.

APPENDIX F

U.S. Department of Labor

Office of Administrative Law Judge
800 K Street, N.W.
Washington, DC 20001-8002

DATE: 3-18-92

CASE NO: 88-DCW-0086

OWCP NO: 40-134355

IN THE MATTER OF

Florence Snowden,
Claimant

v.

Washington Hospital Center,
Employer,

and

Director, Office of Workers'
Compensation Programs,
Party In Interest

Counsel:

Richard W. Galiher, Esq.
For the Claimant

Roger S. Mackey, Esq.
For the Employer

Before: CHARLES P. RIPPEY
Administrative Law Judge

DECISION AND ORDER -- AWARD OF BENEFITS

This matter arises from the claim of Shelton Carlisle under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, as amended, and the regulations promulgated thereunder and found at 20 C.F.R. Parts 701, 702 and 703.

A hearing in this matter was held in Washington, D.C. on January 22, 1992 at which the Claimant was present and all parties were represented by counsel.

The Claimant suffers from a combination of lupus erythematosus and the consequences of a back injury while employed by the Washington Hospital Center as a psychiatric nurse on September 7, 1978. The Employer is currently paying temporary total disability benefits to the Claimant, and has reimbursed all medical bills incurred to date. I find, and the parties agree, that her average weekly age, applicable to this claim, is $289.20.

The claim is for permanent total disability commencing December, 1990, the date of maximum medical improvement. The Claimant does not mention a date in that month, but the first mention of maximum medical improvement is in Dr. Frederic T. Schwartz's letter of December 18, 1990 in which he refers to having seen the Claimant, but does not mention a date.

The Employer does not contest the permanency of the Claimant's disability, but only the Claimant's assertion that it is total. The Employer does not contest the claimed date of maximum medical improvement, and has not suggested any alternate date.

I find that the Claimant has been permanently disabled since December 18, 1990.

The Employer agrees that the Claimant is not able to perform her previous work as a psychiatric nurse, but asserts that it has met its burden of demonstrating the availability of alternate work that the claimant would be capable of performing.

The Claimant has undergone a series of back surgeries. She was diagnosed with joint disease and a ruptured disc at L4/L5 and autofusion at L5/S1. Disc removal and fusion was performed at L4/L5 with edema on the spinal cord following that surgery. Another surgery was performed to alleviate the pressure. In a third surgery the disc at L5/S1 was removed and the joint fused. Subsequently a psudoarthrosis, or false joint, developed at L5/S1, allowing movement in that area which should have been fused.

The Employer agrees that the Claimant is home bound, but asserts that she could work from her home in employment utilizing only the use of her telephone.

The Claimant's treating physician, Dr. Moskovitz, has expressed the opinion that she is not employable "at all". However, when asked whether working in an appropriate chair at home using a telephone would be contraindicated, he said that if she were capable of defining her work on a trial and error basis, where she could go from supine rest to supported sedentary work, that would be an ideal goal for her. While stating that she could be employment in the home, he gave limitations suggesting that she would need to be able alternatively to stand or sit for five hours, the rest of the time she would need to lie down. He stated he would want to review this last limitation with any rehabilitation worker who might be working with her.

The Employer's rehabilitation specialist, Kathleen Sampeck, found four jobs that she thought would be suitable. The job she thought would be best she testified was with

Northwest Mutual Insurance Company in Arlington, Virginia. The title was Appointment setter and paid from $7.00 to $7.50 an hour. The work could be done at home at any time, either seated, reclining or standing. The hours were flexible with a maximum of three hours per day. There would be brief training required, but accommodations could be made for that as well.

In an attempt to follow up, the Claimant called Northwestern Mutual Life Insurance Company in Arlington and she testified that she was told that they did not have anything for anyone to do at home. Ms. Sampeck's report mentioning Northwestern was dated only the day before the hearing. Ms. Sampeck testified after the Claimant and said that the work would be personally for an agent named Robertson, with whom she had personally bought some insurance, and would not be for Northwestern. Therefore, personnel at Northwestern would not know anything about the job, if called.

This job is truly sheltered, and does not represent earning capacity in non-sheltered employment. Further, Ms. Sampeck loses credibility when the job turns out not to be with the employer she first named, Northwestern Mutual, but, rather, a personal arrangement with someone she personally knows. Finally, the requirements of the job were not presented to Dr. Moskovitz, so we cannot know what his opinion would be. Finally, the fact that the Employer only came up with this job opportunity in a report dated the day before the hearing, gives it the feel of a hurried muster to do "something" before trial. With evidence regarding this job opportunity, the Employer has not carried its burden of demonstrating available employment opportunities within the Claimant's capacities.

The second job mentioned by Ms. Sampeck was work as a "telemarketer" for United Business Machines of Lorton, Virginia calling customers who had purchased Canon copiers and tax machines to check on maintenance and ascertain

customer satisfaction. The Claimant testified that when she called she was told that this work must be done in the office, and that no work was available for persons to perform from their home. I found the Claimant to be an extremely credible witness, and accept her testimony on this matter. On the basis of this record, I find that this job was not available for home work.

The third job found by Ms. Sampeck was with One Stop Financial of Damascus, Maryland making calls to local businesses to offer discounts on AT&T long distance telephone services. When the Claimant tried to call One Stop Financial she could find no telephone number either in the phone book or from the assistance operator. Ms. Sampeck provided no address or phone number in her report. I find this job not reasonably available to the Claimant, and, on the basis of this record, also find that this job does not carry the Employer's burden to find suitable available employment.

The final job mentioned by Ms. Sampeck in her report was with Fiber Clean of Rockville, Maryland, and involved making calls to set up appointments to sell carpet cleaning services. When the Claimant succeeded in reaching Fiber Clean on the phone, she was told that although they had some work that could be done at home, a training period of at least two weeks in Rockville would be required before she could start calling from home. In her condition, the Claimant is not able to attend two weeks of training in Rockville, and, therefore, this is not a job that would be reasonably available to her.

The Claimant became permanently and totally disabled within the meaning of the Act on December 18, 1990.

The Claimant's injury to her back was exacerbated by her pre-existing lupus erythematosus. The medical evidence to this effect in the record is uncontradicted.

ORDER

The claim of Florence Snowden to benefits under the Act is approved. The Employer ordered to pay all periodic permanent total disability benefits to which the Claimant is entitled commencing as of December 18, 1990 and continuing for a period of 104 weeks thereafter, including periodic increases to which she may be entitled under the Act. Thereafter, the Director, is ordered to arrange for payment of such benefits from the Special Fund established under §44 of the Act. The Employer remains liable for all medical benefits to which the Claimant is entitled, even after the expiration of said 104 week period. The Employer also is liable for interest on all benefits ordered herein that have not previously been paid from the period for which any portion of such payment is due until the date of actual payment.

The interest rate shall be calculated in accordance with 28 U.S.C. 1961 which provides that interest in a civil case recovered in a United States District Court shall calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52 week United States Treasury bills settled immediately prior to the date of the judgment.

/s/ Charles P. Rippey

Charles P. Rippey
Administrative Law Judge
Voice Phone 202-633-0042
Fax Number 202-633-0325

Washington, D.C.

CPR:bdw

CERTIFICATE OF FILING AND SERVICE

I certify that on March 27, 1992 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 40th District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Florence Snowden
Claimant
8104 Oakwood Drive, Clinton, MD 20735

Aetna Casualty & Surety Company
P.O. Box 10127
Fairfax, VA 22030
Insurance Carrier or Employer (if self-insured)

Roger S. Mackey, Esquire
12701 Fair Lakes Circle
Suite 470
Fairfax, VA 22033

A copy was also mailed by regular mail to the following:

Judge Charles P. Rippey, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20001-8002

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA), U.S. Department of Labor, Washington, DC 20211

Richard W. Galiher, Esquire
Galiher, Clarke & Galiher
5 North Adams Street
Rockville, MD 20350
Washington Hospital Center
110 Irving Street, NW
Washington, D.C. 20010

MARIA BORRERO
District Director
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

APPENDIX G

Government of the District of Columbia
Department of Employment Services
Labor Standards
1200 Upshur Street, N.W.
Suite 100
Washington, D.C. 20011

IN THE MATTER OF:	:	
	:	
Florence Snowden	:	Supplementary
	:	Compensation Order
	:	Awarding 20 Percent
CLAIMANT	:	Additional
		Compensation
	:	Pursuant to Section 14(f)
Washington Hospital Center	:	of the Act
	:	
	:	
EMPLOYER	:	Case File No: 40-134355
	:	
Aetna Casualty & Surety Co.	:	
	:	
	:	
INSURER		

Claim has been made by claimant's counsel in this matter for assessment of additional compensation pursuant to Section 14(f) of the Act. This claim is based on the carrier's failure to make permanent total disability payments in accordance with the Holliday Decision. It appears the claimant should have been paid in the amount of $438.00 per week from June 15, 1998 to

September 30, 1998, 15 3/7 weeks, which totals the amount of $6,757.56. Commencing October 1, 1998, there was a 4.31% cost of living increase, therefore, the claimant should have been paid at the compensation rate of $457.00 per week to the present, October 16, 1998, and continuing, 2 2/7 weeks, for a total of $1,044.64. Total amount which should have been paid to the claimant is $7,802.20.

It appears that the carrier adjusted the claimant's compensation rate to $237.00 per week as of June 15, 1998 and paid at this rate through September 30, 1998, 15 3/7 weeks, for a total of $3,656.88. As of October 1, 1998 the claimant's rate was adjusted to $247.00 to reflect the cost of living adjustment of 4.31% for a total of $564.64. It appears the total amount paid to date, October 16, 1998, is $4,221.52.

The difference in the amount which should have been paid to the claimant is $3,580.68.

This matter has been reviewed in its entirety and this office has taken the position that the carrier is in violation with the final compensation order issued on December 9, 1996.

ORDER

The employer's insurance carrier, Aetna Casualty & Surety Company, is hereby ordered to pay the claimant the sum of $3,580.68 plus the 20% penalty in the amount $716.14 for a total of $4,296.82 pursuant to the provisions of Section 14(f) of the Longshore and Harbor Workers' Compensation Act. The Form LS-208 must be filed reflecting this payment.

Given under my hand and filed at Washington, D.C. this 16th day of October 1998.

/s/ L.J. Baxter

for Charles L. Green
Associate Director

CERTIFICATE OF FILING AND SERVICE

I Certify that on October 16, 1998, the foregoing Compensation Order was filed in the Office of the District Director, 40th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representative at the last known address of each as follows:

CLAIMANT:

Florence Snowden
8104 Oakwood Drive
Clinton, Maryland 20735

COUNSEL FOR CLAIMANT:

Richard W. Galiher, Esquire
Galiher, Clarke & Galiher
401 East Jefferson Street, Suite #101
Rockville, Maryland 20850

INSURANCE CARRIER OR EMPLOYER (IF SELF-INSURED):

Aetna
c/o Travelers
P.O. Box 10892
Chantilly, Va. 20151

COUNSEL FOR EMPLOYER/CARRIER

Michael Collington, Esquire
Law Offices of Roger Mackey
14008 Park East Circle
Chantilly, Virginia 20151

A copy was also mailed by regular mail to the following:

Director, Office of Workers' Compensation Programs, (LHWCA),
U.S. Department of Labor, Washington, D.C. 20210

/s/ L.J. Baxter

for Charles L. Green
Associate Director
40th Compensation District
U.S. Department of Labor
Office of Workers' Compensation
Program

It should be noted that the provisions of Section 14(f) are mandatory and self executing. Only an order by the Benefits Review Board or Court staying payment of the additional 20 percent compensation can relieve an employer/carrier from this liability. There is no discretion vested in the District Director to excuse payment of the compensation after it becomes due.

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1318 September Term, 2000

Filed: August 27, 2001
Clerk

Florence Snowden,
Petitioner

v.

Director, Office of Workers' Compensation Programs, et al.,
Respondents

BEFORE: Ginsburg, Chief Judge; Williams and Rogers, Circuit Judges

ORDER

Upon consideration of respondents' petition for rehearing filed July 27, 2001, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX I

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1318 September Term, 2000

Filed: August 27, 2001
Clerk

Florence Snowden,
Petitioner

v.

Director, Office of Workers' Compensation Programs, et al.,
Respondents

BEFORE: Ginsburg, Chief Judge; Edwards, Williams, Sentelle, Henderson,* Randolph, Rogers, Tatel and Garland,* Circuit Judges

ORDER

Upon consideration of respondents' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

---

* Circuit Judge Henderson and Circuit Judge Garland did not participate in this matter.

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

33 USC §908(f)

Injury increasing disability:

(1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury.

* * *

In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

* * *

33 USC §910(f) (as amended in 1972)

Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after [October 27, 1972] shall be increased by a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined [by the Secretary of Labor] under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

33 USC §914(f)

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 of this Act and an order staying payment has been issued by the Board or court.

33 USC §918(a)

In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order for a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 19 of this Act, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall, upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law.

* * *

33 USC §921(a)

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19 of this Act, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

* * *

(b)(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole....

* * *

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.... Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified....

* * *

33 USC §922

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(I) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This Section does not authorize the modification of settlements.

(2)

No. 01-1191

Supreme Court U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

WASHINGTON HOSPITAL CENTER

and

AETNA CASUALTY AND SURETY CO.
(now known as Travelers),

Petitioners,

v.

FLORENCE SNOWDEN

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT FLORENCE SNOWDEN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether the D.C. Circuit was correct in deciding that the Benefits Review Board did not have jurisdiction of the District Director's Order, issued under §918(a) of the Longshore Act, finding a default in payment under the original 1992 award.

B. Whether a Petition for Certiorari should be granted to interpret §910(f) of the Act, and decide whether the *Brandt/Holliday* method of calculating adjustments under the Act should be overruled.

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SUPREME COURT:

S. Ct. R. 10 10

COUNTERSTATEMENT OF THE CASE

After the Benefits Review Board's ("Board") decision of December 9, 1996 (Pet. App. 33a) had become final, the Associate Director's office, acting on behalf of the Federal Respondent, Director, Office of Workers' Compensation Programs, United States Department of Labor ("OWCP"), by letter dated March 2, 1998, notified Petitioner Aetna that cost of living adjustments under §910(f) had not been paid for the years 1995, 1996 and 1997 (Resp. App. 2a). It is, therefore, incorrect for Petitioners to allege that this was the "first annual adjustment to be assessed since Employer/Insurer resumed payments" (Pet. App. 4) after the Board's 1996 decision. Petitioners did not respond to the District Director's letter of March 2, 1998 nor a subsequent letter of June 5, 1998 until June 11, 1998. (Resp. App. 3a).

After finally responding on June 11, 1998, Petitioners refused to pay §910(f) adjustments, as required by the D.C. Circuit's decision in *Brandt v. Stidham Tire Co.*, 785 F.2d 329 (D.C. Cir. 1986) (*"Brandt/Holliday"*), Respondent Snowden then requested the District Director to issue a Supplementary Compensation Order "pursuant to 33 U.S.C. §918(a)" (Pet. 4) which ordered Aetna to pay annual cost of living adjustments calculated "in accordance with the *Holliday* decision" (Pet. p. 4), [*Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981)] because Petitioners were "in violation with [sic] the Final Compensation Order issued on December 9, 1996." (Pet. App. 56a).

Petitioners then appealed the District Director's Supplementary Compensatioin Order to the Board, which reversed the District Director's Supplementary Order. (Pet. App. 14a). However, Snowden appealed the Board's

Decision and Order on Reconsideration to the D.C. Circuit which reversed the Board, and concluded "that the Board lacked the jurisdiction to review the 1998 Supplemental Compensation Order because it was a final Order unreviewable by the Board." (Pet. App. 7a). The D.C. Circuit also concluded that the District Director's Order was "manifestly an Order for the collection of defaulted payments within the meaning of §918(a)" and "notwithstanding the general grant of jurisdiction to the Benefits Review Board contained in 33 U.S.C. §921(b)(3)," that all circuits which had addressed the issue have concluded that "actions for the enforcement of orders declaring default in the payment of [installments] due under either §914(f) or any other substantive section of the [Longshore and Harbor Workers' Compensation Act] are to be brought in the district court and only subsequent thereto, by appeal to the appropriate court of appeals" citing *Tidelands Marine Serv. v. Patterson*, 719 F.2d at 129 (5th Cir. 1983); *Sealand Serv., Inc. v. Barry*, 41 F.3d 903, 907 (3rd Cir. 1994); and *Providence Wash. Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 1385 (9th Cir. 1985). (Pet. App. 11a).

THe D.C. Circuit also found that Petitioner Aetna had paid or reimbursed benefits paid to Ms. Snowden pursuant to the 1992 Compensation Order (Pet. App. 47a) "without challenging OWCP's methodology for calculating Ms. Snowden's compensation rate" until 1998, when "it relied on the Board's decision in *Bailey* which acknowledged a change of law in ruling that the *Brandt/Holliday* rule 'no longer applies to cases under the [ ] Act.' *Bailey*, 1998 WL 285563, at *4." (Pet. App. 12a). Furthermore, the D.C. Circuit also refused to decide the "*Brandt/*

Holliday" method of calculating permanent total benefits under §910(f), because of its conclusion that the Board "lacked jurisdiction to review the supplementary compensation order issued pursuant to §918a" and vacated the 1999 decision and order of the Board. (Pet. App. 14a).

STATUTORY BACKGROUND

The Longshore and Harbor Workers Act, 33 U.S.C. §901, *et seq.* ("the Act") provides workers' compensation benefits to certain types of workers who have been injured in the course of their employment. The Act was extended by amendment to the District of Columbia, by the District of Columbia Workers' Compensation Act of 1928, 45 Stat. 600, and 36 D.C. Code §501-02 (1973) which provides in pertinent part that the "provisions of the Longshoremen's and Harbor Workers Act . . . shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia irrespective of the place where the injury or death occurred." Furthermore, the 1984 Amendments to the Act did not apply to District of Columbia injuries occurring after July 26, 1982, because the District of Columbia had repealed the District of Columbia Extension of the Longshore Act, when it enacted the District of Columbia Workers' Compensation Act of 1979, 36 D.C. Code §501 *et seq.* (The D.C. Circuit has held that the District of Columbia's Longshore Extension applies only to pre-1982 injuries but not subsequent injuries. *See Keener v. WMATA*, 800 F.2d 1173 (1986), *cert. denied*, 480 U.S. 918 (1987)).

The same or similar language to the current version of 33 U.S.C. §918(a), involving collection of defaulted

payments by a filing in the U.S. District Court, has been in the Longshore Act since 1926. Section 918(a) provides a method for collection of defaulted payments by filing the Supplementary Order of the Deputy Director (herein "District Director"), declaring the amount in default (Pet. App. 55a), with the United States District Court for the District of Columbia. Section 918(a) also states: "[I]n case of default by the employer in the payment of compensation due under any award of compensation for a period of 30 days after the compensation is due and payable . . . " if such order is "in accordance with law," then "the Supplementary Order of the Deputy Director shall be final" and the District Court "shall upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order."

REASONS FOR DENYING THE WRIT

I. THE D.C. CIRCUIT CORRECTLY CONCLUDED THAT THE BENEFITS REVIEW BOARD DID NOT HAVE JURISDICTION.

The D.C. Circuit concluded that the Benefits Review Board ("Board") did not have jurisdiction under 33 U.S.C. §921(b)(3) to review the District Director's Supplementary Order for Petitioners to pay defaulted payments. (Pet. App. 55a) because there was already a statutory mechanism in 33 U.S.C. §918(a) of the Act for Petitioners to challenge it. In denying the Board's jurisdiction, the D.C. Circuit determined that the Board's Order on Reconsideration (Pet. App. 14a) reversing the District Director's Default Order should be reversed, because §918(a), not

§921(b)(3) of the Act, provided both exclusive jurisdiction and a remedy for Petitioners.

In asserting herein that the D.C. Circuit was incorrect in its finding that the Board lacked jurisdiction, Petitioners urge this Court to accept the Board's erroneous conclusion that the District Director's 1998 Supplementary Compensation Order (Pet. App. 55a) was appealable to the Board because the *Brandt/Holliday* calculation method had not been previously reduced to a formal Compensation Order. However, at the time of the original Order in 1992 by the Administrative Law Judge ("ALJ") (Pet. App. 47a), such calculations were not normally done in ALJ Compensation Orders, but were routinely prepared by the District Director for the Director OWCP when an Administrative Law Judge's award of permanent total benefits was filed and served by the Director on the parties. Furthermore, the D.C. Circuit concluded that although §910(f) was not explicitly mentioned in the ALJ's 1992 Compensation Order, that this was "implicit" in light of "*Brandt/Holliday*" and because for years Aetna had paid without challenging the District Director's methodology for calculating Ms. Snowden's compensation. (Pet. App. 12a).

After the Administrative Law Judge's Order of March 18, 1992 which provided for "periodic increases . . . " (Pet. App. 47a), §910(f) calculations were made by the District Director (Resp. App. 20), and the first permanent total payments to Snowden commenced by Petitioners. Again in 1994, after the Board affirmed the Administrative Law Judge's permanent total award, and reversed and remanded to the ALJ for further findings on the §908(f) issue (Pet. App. 38a), Petitioners again

appealed the ALJ's findings on remand to the Board, and in 1996, the Board affirmed the ALJ's decision on remand. (Pet. 33a). After this Order of the Board became final, Petitioners reimbursed to the District Director accrued benefits totaling $32,027.22 (including *Brandt/Holliday* adjustments which had been paid by the Director OWCP to Snowden during the Director's appeal), for §908(f) payments which had been made to Snowden from 1992 through 1996. (Resp. App. 7a).

Petitioners assertion of a cert-worthy conflict based upon the Fifth Circuit's decision in *Bray v. Director,* 664 F.2d 1045 (5th Cir. 1981) is based on a misreading of *Bray, supra,* which is both factually and legally distinguishable. In *Snowden,* Petitioners do not dispute that the Executive Director for the District Director issued a Supplemental Order "pursuant to 33 U.S.C. §918(a)" (Pet. 2) after they improperly reduced Snowden's payments in 1998 based upon their misinterpretation of the Board's decision in *Suzin Bailey v. Pepperidge Farm, supra.* (Resp. App. 8). In *Bray, supra,* contrary to *Snowden,* there was no default declared by the Deputy Commissioner's Supplementary Order. In *Bray, supra,* the Fifth Circuit only addressed "whether an error of fact or law in a supplementary order *finding no default* is reviewable before the Benefits Review Board." *Id.* at 664 A.2d 1048 (emphasis supplied) and concluded that the Board had jurisdiction. (In *Suzin Bailey,* 32 BRBS 76 (1988), the disputed Order appealed to the Board did not involve a default but only a Supplemental Order to pay a §914(f) penalty). (Resp. App. 11).

Petitioners also cite *dicta* from *Bray, supra,* where the Fifth Circuit suggests that the Board should be given jurisdiction where an Order is "ambiguous or unclear."

However, Petitioners do not suggest in their Petition for Certiorari, how the District Director's Supplementary Order was ambiguous or unclear, and, in fact, have failed to print *both* of the Orders issued by the District Director in their Appendix (Pet. App. 6a, n. 8). While Petitioners now for the first time claim "uncertainty" about the District Director's Supplementary Order which the Board reversed, *Bray, supra,* also required that any alleged uncertainty must be such that it was "not reasonably apparent at the time of the entry of the Order." *Bray, supra.* Petitioners did not raise any claim of uncertainty before the D.C. Circuit below, nor when they appealed the Administrative Law Judge's original Order to the Board in 1992, nor again in 1996, when Petitioners reimbursed the Director's §908(f) payments (Resp. App. 7) after the Board's affirmance of Judge Rippey's subsequent Order on remand became final. (Pet. App. 33a).

Petitioners also mistakenly assert herein the existence of "a controversy" involving interpretation of a "substantial question of law and fact" in the District Director's Supplementary Order as a basis for the Board's appellate jurisdiction under 33 U.S.C. §921(b)(3). However, Petitioners also admit that this controversy was self-generated by their "default" (Pet. 6) "in the payment of compensation due under an award" (Pet. App. 8). As noted by the D.C. Circuit, this controversy and default did not occur until after "a change in law" in *Sūzin Bailey v. Pepperidge Farms, supra,* when Petitioners had reduced Snowden's compensation payments, which Petitioners had paid without any controversy since 1992. (Pet. App. 12a). Furthermore, a change in decisional law ordinarily is not regarded as a sufficient circumstance for relief of a

final judgment or order. *See Miller v. French*, 530 U.S. 327, 344 (2000).

Petitioners also assert herein that "the Longshore Act should not be interpreted so simplistically, and absolutely as to prevent substantive review of such disputes by the BRB, the forum created by Congress for that purpose." (Pet. 8). However, the D.C. Circuit found that all "the circuits to address this issue have concluded" that the proper forum specified by Congress in §918(a) of the Act for review of this type of dispute was the United States District Court, not the Benefits Review Board. (Pet. App. 11a).

Petitioners also allege herein that they did not have "timely notice" that the OWCP was applying *Brandt/Holliday*. This allegation is incorrect. While Petitioners assert that the only document in the record which mentions *Brandt/Holliday* was an undated benefit calculation sheet, which was an attachment to an internal OWCP letter dated Monday, April 27, 1992 (Resp. App. 18a-20a). It had been the longstanding consistent administrative practice of Deputy Directors ("District Directors") after all permanent total awards issued by Administrative Law Judges, to prepare and circulate to the parties the Director's written calculations of what payments are due under the award, because annual cost of living adjustments under §910(f) are automatically payable every October 1st, and are not otherwise calculated within §910(f) of the Act. While Petitioners also allege that on the face of this document there is no "record evidence that this calculation sheet was ever served on Employer-Insurer by OWCP," they also argue alternatively that, even if the information had been served, it was "erroneous, insufficient and misleading as to the law." (Pet. 9). However, assuming, *arguendo*, that

Petitioners were served with the District Director's benefit calculation, and found those calculations to be erroneous, insufficient or misleading, Petitioners nevertheless paid *Brandt/Holliday* benefits pursuant to the District Director's calculations. Furthermore, Petitioners do not state what steps, if any, they took to request that the District Director correct or clarify the alleged miscalculations, until after the Board in *Suzin Bailey, supra,* incorrectly decided that it had jurisdiction to decide that the law of the D.C. Circuit in *Brandt, supra,* had been changed by the Fifth Circuit's decision in *Phillips v. Marine Concrete Structures, Inc.,* 895 F.2d 1033 (5th Cir. 1990) (en banc).

II. THIS COURT SHOULD NOT GRANT JURISDICTION TO REVIEW *BRANDT/HOLLIDAY,* BEFORE REVIEW BY THE D.C. CIRCUIT.

Petitioners incorrectly suggest that this Court may reverse the D.C. Circuit and decide the viability of *Brandt, supra,* herein, because the District Director's 1992 benefit calculations using *Holliday, supra,* had already been overruled in the Fifth Circuit by *Phillips, supra.* However, *Phillips v. Marine Concrete, supra,* did not purport to vacate *Brandt, supra,* in the D.C. Circuit. Furthermore, the D.C. Circuit should be given the first opportunity to review *Brandt, supra,* since this Court previously refused to review the *Holliday, supra,* method of computing benefits in *Southeastern Maritime Company v. Brown,* 121 F.3d 648, *reh'g en banc denied,* 132 F.3d 48 (11th Cir. 1997), *cert. denied,* 524 U.S. 951 (1998).

CONCLUSION

This Court's rules establish that "certiorari will be granted only for compelling reasons." S. Ct. R. 10. The D.C. Circuit decision at issue here involves fact-bound applications of settled legal principles and raises no compelling issues calling for the exercise of this Court's discretionary certiorari power. It does not conflict with any other decision by any other court, and was rendered in the context of a statutory scheme which provides an adequate remedy at law. The decision is also correct, and for this reason alone, further review by this Court is not warranted.

Inasmuch as three years ago this Court declined the opportunity to review the 11th Circuit decision in *Southeastern Maritime Company v. Brown, supra,* which affirmed continuing use of the *Holliday* method of §910(f) adjustments in that Circuit, despite conflicting circuits, there is no reason for this Court to revisit the issue again now. In fact, the D.C. Circuit commented that *Snowden* will be "one of the last claims" likely to be decided under the former D.C. statute, which has been repealed since 1982 for injured workers in the District of Columbia. (Pet. App. 2a).

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

RICHARD W. GALIHER, JR.
GALIHER, CLARKE & GALIHER
401 E. Jefferson Street, Suite 101
Rockville, MD 20850
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Counsel of Record
for Respondent Snowden

APPENDIX

* * *

Government of the District of Columbia
Department of Employment Services

Labor Standards Washington, D.C. 20011
• 1200 Upshur Street, N.W. • Suite 100 •

March 2, 1998

Roger Mackey, Esquire
Conrad A. Fontaine
12701 Fair Lakes Circle, Suite #470
Fairfax, VA. 22033

RE: Florence Snowden v. Washington Hospital Center
OWCP Number: 40-134355
D/A: 08/07/78

Dear Attorney Mackey,

As you are aware the claimant has been awarded permanent total disability benefits which are to be paid by the self-insured employer. Every October 1st of each year the claimant is entitled to a cost-of-living adjustment to be paid by the self-insured employer. The carrier confirmed that as of October 1, 1994 the claimant was paid at the rate of $398.80 per week. Please have the self-insured employer complete the enclosed forms which verify that the claimant has received her annual cost-of-living adjustments for 1995, 1996 and 1997. The forms reflect that the claimant should have been paid as follows:

YEAR	% INCREASE	COMP. RATE
1994	3.06%	$398.80
1995	2.83%	$410.00

1996	2.38%	$420.00
1997	4.33%	$438.00

Please forward the completed LS-521 forms to my office as soon as possible so that I can verify that the claimant is being paid at the correct compensation rate. If you should have any questions or concerns, please do not hesitate to contact me on (202) 576-6265.

Sincerely,

/s/ Lisa Baxter
Lisa Baxter
Claims Examiner
District #40

LAW OFFICES
OF
WILLIAM C.E. ROBINSON
Suite 470
12701 FAIR LAKES CIRCLE
FAIRFAX, VIRGINIA 22033

(**DC*MD+VA)
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FAX (703) 568-3617

June 11, 1998

Lisa Baxter, Claims Examiner
Government of the District of Columbia
Department of Employment Services
Labor Standards
1200 Upshur Street, N.W.
Suite 100
Washington, D.C. 20011

RE:	Named Insured:	Washington Hospital Center
	Claimant:	Florence Snowden
	Claim No.:	F 53 3535398 RG
	OWCP No.:	40134355
	D/A:	8/7/78
	Our File No.:	880026

Dear Ms. Baxter:

This letter will confirm our phone conversation on Thursday, June 11th regarding the above-captioned. It is my

understanding that your Department is taking the position that my client owes cost of living adjustments compounded going back to the date of the accident once the Claimant was awarded permanent and total disability. You are relying upon the cases of *Holliday* vs. *Todd Shipyards Corporation* 654 Fed 2nd 415 13 DRBS 741 5th Circuit 1981 and a D.C. Circuit case interpreting *Holliday* known as *Brandt* vs. *Steidham Tire Company* 785 Fed 2nd 329 18 DRBS 73 (crt) (D.C. Circuit 1986). It is the position of the Employer and Insured that *Phillips* vs. *Marine Concrete Structures, Inc.*, 895 Fed 2nd 1033, 23 DRBS 36 (crt) (5th Circuit 1990) (Enbanc) controls. Phillips reversed Holliday in the 5th Circuit and basically held that cost of living adjustments are calculated from the date of permanent and total forward. As you know, in the Brandt case the D.C. Circuit Court of Appeals stated "in some, we accept the Holliday ruling as the proper reading of the statute in this Circuit *at least until the precedent is overruled in the 5th Circuit.*" As you well know, Holliday was overruled in the 5th Circuit by the Phillips decision.

Most recently, we have the Benefits Review Board decision in *Suzin R. Bailey* vs. *Pepperidge Farm, Inc. and Liberty Mutual*, which as you know is a local Long Shore case. The Benefits Review Board stated unequivocally "therefore, Holliday no longer applies to cases arising under the D.C. act." The original Order in this case awarded the Claimant permanent and total disability effective December 18, 1990 and my client will continue to make permanent and total payments, however, based on the adjustments per Phillips and Baily. Our records show that the Claimant should presently be receiving disability benefits at the rate of Two hundred, thirty-six dollars

($236.00) per week and we intend to make payments accordingly. We will not make payments pursuant to your letter of June 5, 1998 which shows a 1997 compensation rate of Four hundred thirty-eight dollars ($438.00).

Finally, my client has paid disability benefits totaling One hundred ninety three thousand, sixty dollars and ninety-five cents ($193,060.95). Per the enclosed audit sheet, my client's obligation to date is One hundred, sixteen thousand, four hundred thirty-six dollars and sixty-four cents ($116,436.64). We therefore, have overpaid the Claimant Seventy six thousand, six hundred twenty-six dollars and thirty-one cents ($76,626.31). Since these payments were made voluntarily (no Order to pay supplemental allowances) we respectfully request an Order allowing the Employer and Insurer to take a credit pursuant to 36-USC Section 914 (J).

We look forward to hearing from you.

Very truly yours,

/s/ RGM/BSB
Roger S. Mackey

RSM/bsb

cc: Bruce Sackett, Claim Representative
Richard W. Galiher, Jr.

* * *

Government of the District of Columbia
Department of Employment Services

Labor Standards Washington, D.C. 20011
• 1200 Upshur Street, N.W. • Suite 100 •

07 MAR 1996

MEMORANDUM FOR: Joseph F. Olimpio, Director
Longshore and Harbor
Workers' Compensation

FROM: /s/ L.J. Baxter
for Joseph P. Yeldell
Acting District Director

SUBJECT: Case of Florence Snowden vs.
Washington Hospital Center
OWCP File No: 40-134355
Reimbursement to Special Fund

Please be advised that this office has been successful in its attempts to retrieve the monies owed to the Special Fund. Attached is a check for the entire reimbursement amount of $32,077.22.

We will continue to closely monitor this case.

ATTACHMENT

CHECK NO. 5958862Z CD 4

AGENT

053 0000038 053 C 0000000106217 CCA WASH HOSP CENT 6R/ 00 7110

LOSS DATE CHECK DATE

02/28/96

AMOUNT

$32,077.22

THIRTY TWO THOUSAND SEVENTY SEVEN AND 22/100 DOLLARS

SPECIAL FUND REIMBURSEMENT

COLUMBIA BANK OF DELAWARE, N.A.

CC FROM 12/7/1995 THRU 02261996

ORDER OF OFFICE OF WORKERS COMP PROGRAM LONGSHORE & HARBOR W/C DIVISION

DISTRICT 40

1200 U[illegible] STREET NW

WASHINGTON DC 20011

BEST AVAILABLE COPY

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

[SEAL]

BRB No. 97-1156

SUZIN R. BAILEY Claimant-Respondent v. PEPPERIDGE FARM, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**PUBLISHED** DATE ISSUED: MAY 19 1998 DECISION and ORDER

Appeal of the Supplementary Compensation Order Awarding 20 Percent Additional Compensation of Charles L. Green, Associate Director, Office of Workers' Compensation Programs, United States Department of Labor.

Donald P. Maiberger (Anderson & Quinn), Rockville, Maryland, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplementary Compensation Order Awarding 20 Percent Additional Compensation (No. 40-170387) of Associate Director Charles L. Green rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973) (the D.C. Act). We must affirm the findings of the district director unless they are shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting).

On November 7, 1981, claimant injured her back and leg while working for employer as a manager of a Godiva chocolate store. The work-related injuries caused additional problems to her neck and shoulder, as well as psychiatric problems. On August 14, 1992, Administrative Law Judge Robert S. Amery awarded claimant permanent total disability benefits from December 5, 1989, medical benefits, an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and interest. Additionally, the administrative law judge awarded claimant statutory adjustments to her award. Employer had voluntarily paid claimant temporary total disability benefits since approximately April 1982.

In calculating the amount to be paid pursuant to this decision, a dispute arose between employer and the district director in 1996 concerning whether cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), should be paid in accordance with *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT) (D.C. Cir. 1986) (adopting the holding in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981) that the rate paid for permanent total disability should include all intervening Section 10(f) adjustments occurring during periods of prior temporary total disability). On April 1, 1996, the district director advised employer to pay Section 10(f) annual adjustments for claimant's permanent total disability benefits effective October 1, 1994, and October 1, 1995. These annual adjustments were computed in accordance with *Holliday*. In August 1996, a claims examiner informed employer's attorney by letter that *Holliday* is applicable in cases arising under the D. C. Act and that employer accordingly should adjust claimant's compensation rate to reflect the holding in *Holliday*. If employer did not agree with the district director's position, it was advised to contact Joseph Olimpio, Director of the Longshore and Harbor Workers' Compensation Division of the United States Department of Labor. On September 5, 1996, employer contacted Mr. Olimpio by letter and requested that the Office of Workers' Compensation Programs no longer follow the *Holliday* decision because it had been overruled by the Fifth Circuit. *See Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*). Mr. Olimpio responded to employer's letter on February 12, 1997,

advising employer that the Office of Workers' Compensation Programs would continue to follow the *Holliday* formula in cases arising under the D.C. Act until the United States Court of Appeals for the District of Columbia Circuit overruled *Brandt*. Subsequently, on June 2, 1997, a claims examiner advised employer by letter that an employer failed to pay the correct amount based on *Holliday*, an assessment pursuant to Section 14(f) of the Act, 33 U.S.C. §914(f), would be entered.

On June 3, 1997, the district director issued a supplementary order awarding a 20 percent assessment pursuant to Section 14(f) as employer failed to pay claimant her annual adjustments pursuant to Section 10(f) in accordance with *Holliday*.[1] The district director denied employer's motion for reconsideration in which employer asserted that the district director should not follow *Holliday* as it had been overruled by *Phillips*.

On appeal, employer challenges the district director's Supplementary Compensation Order awarding a Section 14(f) assessment on the ground that the Section 10(f) computations are incorrect as a matter of law.[2] Neither

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[1] Section 14(f) provides that compensation payable under the terms of an award must be paid within 10 days after it is due; if it is not timely paid employer is liable for an assessment in the amount of 20 percent of the unpaid compensation. As claimant should have received $143,340.05 from employer based on *Holliday* but only received $120,379.61, a difference of $22,960.44, the district director ordered employer to pay the 20 percent Section 14(f) assessment in the amount of $4,592.08.

[2] By Order dated July 7, 1997, employer's motion for a stay of payments was denied, and employer was directed to notify the Board whether it had paid the amount due under the terms

claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief.

Initially, we hold that due process requires that we decide the Section 10(f) issue raised by this appeal. Ordinarily, an employer may not collaterally attack an underlying compensation award through an appeal of a Section 14 penalty. *See, e.g., Abbott v. Louisiana Ins. Guaranty Ass'n*, 889 F.2d 626, 23 BRBS 3 (CRT) (5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990) (enforcement proceeding under Section 18(a) limited to lawfulness of the supplemental order of default and does not include the substantive correctness of the underlying compensation order); *Brown*, 30 BRBS at 29 (dealing with timeliness of employer's payment). After our review of the procedural history of this case, however, it is apparent that employer had no earlier opportunity to challenge the basis underlying the district director's Section 14(f) assessment, *i.e.*, the computation of the Section 10(f) adjustment pursuant to *Holliday*. *See generally Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981) (Board has jurisdiction to hear appeal raising issue of underlying law or fact where district director finds default inappropriate order); *Kelley v.*

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of the district director's order. Employer notified the Board by letter dated July 31, 1997, that it has paid the assessment pursuant to Section 14(f) in accordance with the district director's order. As employer paid claimant the amount owed under the terms of the district director's order, the Board has jurisdiction to review the imposition of the Section 14(f) assessment. *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 29 BRBS 1 (CRT) (3d Cir. 1994), *aff'g* 27 BRBS 260 (1993); *see also Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 17 BRBS 135 (CRT) (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 16 BRBS 10 (CRT) (5th Cir. 1983).

Bureau of National Affairs, 20 BRBS 159 (1988). The administrative law judge did not specifically order the calculation of Section 10(f) adjustments pursuant to *Brandt/Holliday*, and the district director did not issue any compensation orders concerning Section 10(f) prior to the assessment of the Section 14(f) penalty. Thus, this appeal presents the earliest opportunity for employer to challenge the Section 10(f) calculation. Moreover, no party challenges the propriety of employer's appeal, which involves strictly a legal issue. *See Brown*, 30 BRBS at 29.

Next, we address employer's contention that the district director erred in awarding the Section 14(f) assessment because employer failed to pay claimant's Section 10(f) annual adjustments to claimant's permanent total disability benefits in accordance with *Holliday*.[3] Employer contends that the United States Court of Appeals for the District of Columbia Circuit only conditionally accepted *Holliday* in its decision in *Brandt*, and as *Holliday* was overruled by *Phillips* in the Fifth Circuit, the district director should no longer apply *Holliday* to cases arising under the D.C. Act.

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[3] Despite employer's contention to the contrary, the district director had authority to award a Section 14(f) assessment in this case involving no dispute as to the facts but only a legal dispute concerning the applicability of *Holliday* to this case. *Patterson v. Tidelands Marine Service*, 15 BRBS 65 (1982), *rev'd on other grounds sub nom. Tidelands Marine Service v. Patterson*, 719 F.3d 126, 16 BRBS 10 (CRT) (5th Cir. 1983).

Section 10(f) provides in relevant part:

> Effective October 1 of each year, the compensation . . . payable for permanent total disability . . . arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under Section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

33 U.S.C. §910(f) (1982).[4] In *Holliday*, the Fifth Circuit adopted the Director's method for computing permanent total disability benefits and held that claimants, upon becoming permanently totally disabled, are entitled to intervening percentage increases reflecting annual cost-of-living adjustments pursuant to Section 10(f) that accrued during any earlier period of temporary total disability. *Holliday*, 654 F.2d at 417, 421-423, 13 BRBS at 741-742, 746-747. The District of Columbia Circuit in *Brandt* accepted the *Holliday* ruling as the proper reading of the statute in that circuit *"at least until the precedent is overruled in the Fifth Circuit*, or the Director publicly announces that, prospectively, he will seek to apply this current interpretation evenhandedly to all similarly disabled claimants in all circuits." *Brandt*, 785 F.2d at 332, 18

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[4] In 1984, Section 10(f) was amended to add a five percent cap on annual adjustments. The five percent cap is inapplicable to this case as the 1984 amendments to the Act do not apply to cases arising under the 1928 District of Columbia Act. *See Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

BRBS at 78 (CRT) (emphasis added). The court in *Brandt* was reluctant to reject *Holliday* and therefore create a split in the circuits. *Id.*, 785 F.2d at 332, 18 BRBS at 77 (CRT). Moreover, in *Brandt*, the court was displeased with the way the Director was challenging the holding in *Holliday* in every circuit except the Fifth Circuit, the circuit in which the Director had rendered his "allegedly incorrect interpretation." *Id.*, 785 F.2d at 332, 18 BRBS at 77 (CRT).

Subsequently, in *Phillips*, 895 F.2d at 1033, 23 BRBS at 36 (CRT), the Fifth Circuit, sitting *en banc*, overruled its decision in *Holliday* and held that claimants are not entitled to Section 10(f) annual adjustments during previous periods of temporary total disability. In overruling *Holliday*, the Fifth Circuit in *Phillips* concluded that the language of Section 10(f) is plain and unambiguous that the annual adjustments are to be paid only to permanent total disability benefits. *Phillips*, 895 F.2d at 1035, 23 BRBS at 38 (CRT). Moreover, although the court stated that resort to legislative history is unnecessary "where the statute is so lucid," it nonetheless noted that, with regard to Section 10(f), Congress intended to provide for upgrading benefits in future years in cases of permanent total disability and had rejected a version of Section 10(f) providing for annual adjustments to all compensation, whether partial or total, temporary or permanent. *Phillips*, 895 F.2d at 1035 n. 3, 23 BRBS at 38 n. 3 (CRT). Consequently, the court overruled *Holliday* and adopted the new position of the Director that there shall be no Section 10(f) adjustments for periods of temporary total disability, adding that this position was the posture taken by the Board,

except in cases arising in the Fifth and District of Columbia Circuits.[5] *Phillips*, 895 F.2d at 1035, 23 BRBS at 38 (CRT); *see, e.g., Scott v. Lockhead Shipbuilding & Const. Co.*, 18 BRBS 246 (1986). The United States Courts of Appeals for the Second and Ninth Circuits have subsequently adopted the holding in *Phillips*.[6] *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT) (9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990).

After a review of the relevant case law since *Holliday* as set out above, we agree with employer that the district director erred in awarding a Section 14(f) assessment based on employer's failure to pay claimant annual adjustments pursuant to Section 10(f) in accordance with *Holliday*. In *Branch*, the District of Columbia Circuit stated, "In sum, we accept the Holliday ruling as the proper reading of the statute in this circuit *at least until*

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[5] In fairness to the *Holliday* court, the court in *Phillips* noted that the construction of Section 10(f) was not presented by the parties in an adversarial context but as a settlement and that Director acknowledged that his attorney erred in representing the Director's purported position to the court. *Phillips*, 895 F.2d at 1035 n. 4, 23 BRBS at 38 n. 4 (CRT).

[6] The Eleventh Circuit still adheres to *Holliday*. In *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989), the court stated it is bound by all decisions issued by the Fifth Circuit prior to October 1, 1981, when the Eleventh Circuit was created, unless the Eleventh Circuit, in an *en banc* decision, overrules the precedent. Recently, the Eleventh Circuit reaffirmed this position, and declined to grant rehearing *en banc* on this issue. *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140 (CRT) (11th Cir. 1997), *pet. for cert. filed*, ___ U.S.L.W. ___ (U.S. Feb. 24, 1998) (No. 97-1394).

the precedent is overruled in the Fifth Circuit,. . . . " Brandt, 785 F.2d at 332, 18 BRBS at 78 (CRT) (emphasis added). Contrary to the district director's order, the *Brandt* court did not state that it would follow *Holliday* until the District of Columbia Circuit overruled it. Rather, the court stated that it would follow *Holliday* until it was overruled by the Fifth Circuit. As *Holliday* has been overruled by *Phillips* in the Fifth Circuit, the condition precedent set by the court has been satisfied. Therefore, *Holliday* no longer applies to cases arising under the D.C. Act. Claimant is entitled to annual adjustments pursuant to Section 10(f) at a rate including only those adjustments occurring after she became permanently totally disabled. Consequently, the district director's order of a Section 14(f) assessment based on employer's failure to pay annual adjustments pursuant to Section 10(f) in accordance with *Holliday* is reversed.

Accordingly, the Associate Director's Supplementary Compensation Order Awarding 20 Percent Additional Compensation is reversed.

SO ORDERED.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals Judge

* * *

Government of the District of Columbia
Department of Employment Services

Labor Standards Washington, D.C. 20011
• 1200 Upshur Street, N.W. • Suite 100 •

APR 27 1992

MEMORANDUM TO: Joseph F. Olimpio, Director
Longshore and Harbor
Workers' Compensation

FROM: /s/ Ron Wilson Selani
for Maria Borrero
District Director

SUBJECT: Payments from Special Fund for Permanent Total Disability Benefits in accordance with the Decision and Order issued by Administrative Law Judge Charles A. Rippey dated March 18, 1992.
Case of Florence Snowden
OWCP File No: 40-134355

This case is referred to your office for payment of permanent total disability benefits in accordance with the Decision and Order issued by Administrative Law Judge Charles A. Rippey Dated March 18, 1992.

The attached chart outlines compensation payment by Washington Hospital Center/Aetna Casualty & Surety

Company for temporary total disability benefits beginning September 7, 1978 through December 17, 1990, thereafter, employer/carrier is responsible for 104 weeks of permanent total disability benefits beginning December 18, 1990 through December 14, 1992, compensation thereafter to be paid from the Special Fund created under Section 44 of the Act.

MB/md

Average Weekly Wage: $299.20 Compensation Rate: $192.00

Payment Due in the Case of: Florence Snowden

OWCP NO: 40-136355

Payments due to the claimant in accordance with the Decision and Order issued by Administrative Law Judge Charles A. Rippe dated March 10, 1992.

Disability Type	Payable By	From	To	Base Rate	Section 10(f) Increase	Holiday Rate	Compensation Rate	Weeks	Due by Carrier
TTD	CARRIER	09-07-78	09-30-78	$192.80	-0-		$192.80	3 3/7	$ 641.02
TTD	CARRIER	10-01-78	09-30-79	$192.80	$16.00(8.05%)	*$208.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-79	09-30-80	$208.80	$16.00(7.63%)	*$224.80	$192.80	52 1/7	$10,080.68
TTD	CARRIER	10-01-80	09-30-81	$224.80	$16.00(7.03%)	*$240.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-81	09-30-82	$240.80	$21.00(8.87%)	*$261.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-82	09-30-83	$261.80	$15.00(5.68%)	*$276.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-83	09-30-84	$276.88	$12.00(4.51%)	^$288.80	$192.80	52 1/7	$10,080.68
TTD	CARRIER	10-01-84	09-30-85	$288.80	$16.00(5.71%)	*$304.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-85	09-30-86	$304.80	$ 8.00(2.69%)	^$312.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-86	09-30-87	$312.80	$ 5.00(1.69%)	^$317.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-87	09-30-88	$317.80	$ 6.00(1.93%)	^$323.80	$192.80	52 1/7	$10,080.68
TTD	CARRIER	10-01-88	09-30-89	$323.80	$10.00(3.13%)	^$333.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-89	09-30-90	$333.80	$13.00(3.83%)	^$346.80	$192.80	52 1/7	$10,053.14
TTD	CARRIER	10-01-90	09-30-90	$346.80	$11.00(3.26%)	^$357.80	$192.80	11 1/7	$ 2,148.34
PTD	*CARRIER	12-16-90	09-30-91	$357.80	-0-	-0-	$357.80	41	$14,669.80
PTD	CARRIER	10-01-91	09-30-92	$357.80	$ 7.00(2.61%)	*$366.80	$366.80	52 1/7	$19,178.40
PTD	*CARRIER	10-01-92	12-16-92	*Unable to compute at this time because we do not know cola for 10-1-92.					

*These Benefits due the claimant were computed in accordance with the Holiday Decision, therefore the claimant is not entitled to an anual cost of living adjustment until December 16, 1990, which is the date the claimant was found to be permanently and totaly disabled.

^On December 15, 1992, the Special Fund shall commence paying Permanent

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Supreme Court, U.S.
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(3)

No. 01-1191

In the Supreme Court of the United States

WASHINGTON HOSPITAL CENTER AND TRAVELERS PROPERTY CASUALTY CORPORATION, PETITIONERS

v.

FLORENCE SNOWDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Benefits Review Board had jurisdiction over an appeal from a supplementary compensation order under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, finding that petitioners had failed to pay compensation in accordance with a prior compensation award and had incurred additional liability under the Act as a result.

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In the Supreme Court of the United States

No. 01-1191

WASHINGTON HOSPITAL CENTER AND TRAVELERS PROPERTY CASUALTY CORPORATION, PETITIONERS

v.

FLORENCE SNOWDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 253 F.3d 725. The November 15, 1999, decision of the Benefits Review Board (Pet. App. 27a-32a) and the Board's June 30, 2000, decision denying reconsideration (Pet. App. 14a-26a) are unreported. The supplementary compensation order of the Office of Workers' Compensation Programs (Pet. App. 55a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2001. A petition for rehearing was denied on August 27, 2001 (Pet. App. 59a). The petition for a writ

of certiorari was filed on November 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1978, respondent Florence Snowden was injured while working as a psychiatric nurse for petitioner Washington Hospital Center, an employer located in the District of Columbia. Pet. App. 3a, 16a. Because the injury occurred before July 26, 1982, the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, as extended by the Act of May 17, 1928 (District of Columbia Workmen's Compensation Act of 1928), ch. 612, 45 Stat. 600, applies to this case.[1]

Claims for compensation under the LHWCA are administered by the Office of Workers' Compensation Programs (OWCP) of the United States Department of Labor (the Department) and are subject to the comprehensive adjudication scheme provided by Sections 19 and 21 of the Act, 33 U.S.C. 919, 921. OWCP deputy commissioners (now called district directors, see 20 C.F.R. 701.301(a)(7)) are authorized to decide compensation claims and may issue a compensation order when no hearing is required. 33 U.S.C. 919(a) and (c); 20

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[1] In 1979, the Council of the District of Columbia, pursuant to newly acquired home rule authority, passed a new workers' compensation law applicable to injuries occurring on or after its effective date, July 26, 1982. See *Railco Multi-Constr. Co.* v. *Gardner*, 902 F.2d 71, 72-74 (D.C. Cir. 1990); *Keener* v. *Washington Metro. Area Transit Auth.*, 800 F.2d 1173, 1175 (D.C. Cir. 1986), cert. denied, 480 U.S. 918 (1987). The LHWCA-based workers' compensation law, which had previously been in effect, remained effective for injuries that occurred before the effective date of the replacement Act. *Keener*, 800 F.2d at 1175. The 1982 version and the current version of the relevant provisions of the LHWCA do not differ in any material way.

C.F.R. 702.315. Where the parties are unable to reach agreement on the issues or a hearing is requested, a hearing is conducted by an administrative law judge (ALJ), who issues a decision in the form of a compensation order making an award or rejecting a claim. 33 U.S.C. 919(d); 20 C.F.R. 702.348. The Department's Benefits Review Board (the BRB or Board) is authorized to hear and determine appeals from decisions with respect to claims. 33 U.S.C. 921(b)(3). Final orders of the Board are then reviewable in the courts of appeals. 33 U.S.C. 921(c).

The LHWCA also provides for procedures governing the failure to comply with a compensation award. Section 14(f) of the Act, 33 U.S.C. 914(f), provides that if compensation payable under the terms of an award is not paid within ten days after it becomes due, the amount due is augmented by 20% (unless an order staying payment has been issued by the Board or the court of appeals). Section 18(a) of the Act, 33 U.S.C. 918(a), further provides that in case of default by the employer or his agent in the payment of an award for a period of 30 days after the award is due, the person to whom compensation is owed may apply to the district director for a supplementary order declaring the amount of the default. The person entitled to benefits may file the order in district court; the supplementary order "shall be final"; the district court "shall * * * enter judgment for the amount declared in default" by the supplementary order, so long as it is "in accordance with law"; and review of that judgment may be had "as in civil suits for damages at common law," in the court of appeals. *Ibid.*; see also 33 U.S.C. 921(d) (providing for district court enforcement of final LHWCA compensation awards).

2. After respondent's injury in 1978, petitioner Washington Hospital Center and its insurance carrier, petitioner Aetna Casualty and Surety Co. (now known as Travelers), voluntarily paid respondent for periods of temporary total disability, without a compensation award. Pet. App. 40a.[2] When a dispute arose over whether respondent was permanently and totally disabled, the matter was referred to an ALJ for a hearing in January 1992. *Id.* at 48a. In March of that year, the ALJ issued a decision holding that respondent was permanently and totally disabled as of December 1990, and ordered petitioners to pay her compensation for such disability, including periodic increases to which she was entitled under Section 10(f) of the Act, 33 U.S.C. 910(f). Pet. App. 52a. The ALJ, however, limited petitioners' liability to 104 weeks of compensation, ruling that pursuant to the Act's "second injury" provision, Section 8(f), 33 U.S.C. 908(f), the Special Fund administered by the OWCP Director should assume liability for respondent's compensation benefits after expiration of that period. Pet. App. 52a.[3]

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[2] Petitioners refer to themselves jointly as "Employer/Insurer" when describing their actions in this matter. Because of their commonality of interest, we also generally do not distinguish between the employer and insurer in this brief, but simply refer to them as "petitioners."

[3] Under Section 8(f)(1) of the Act, an employer's liability is limited to 104 weeks of compensation if the claimant has a pre-existing permanent partial disability that combines with the employee's compensable injury to render him more disabled than he would have been by the compensable injury alone. 33 U.S.C. 908(f)(1). When these conditions are met, the Special Fund, administered by the OWCP Director and funded primarily by assessments on employers and carriers, assumes responsibility for payment of compensation after 104 weeks. 33 U.S.C. 908(f)(2)(A).

Petitioners appealed the ALJ's ruling to the Benefits Review Board. Pet. App. 3a. The OWCP Director cross-appealed the imposition of Section 8(f) liability on the Special Fund. *Ibid.*

Shortly after the ALJ decision was issued, OWCP calculated the amount of benefits owed to respondent under the compensation award, including the periodic increases to which respondent was entitled under Section 10(f) of the LHWCA, 33 U.S.C. 910(f). Pet. App. 4a. Section 10(f) provides for annual adjustment of the weekly rate of compensation payable for permanent total disability (or death) by the same percentage that the national average weekly wage increased the previous year. 33 U.S.C. 910(f). Although the ALJ's opinion did not expressly state how Section 10(f) should be applied to adjust the benefits payable in this case, the D.C. Circuit had previously adopted the holding in *Holliday* v. *Todd Shipyards Corp.*, 654 F.2d 415, 417, 422 (5th Cir. 1981), that, while no Section 10(f) adjustments should be made during a claimant's period of temporary total disability, the first payment after the total disability becomes permanent (which then serves as the basis for future adjustments) should include all the adjustments that have taken effect since the time of the injury. See *Brandt* v. *Stidham Tire Co.*, 785 F.2d 329 (D.C. Cir. 1986). OWCP thus employed this "*Brandt/Holliday*" method in making the benefits calculations. Pet. App. 4a. This method stands in contrast to what OWCP views as the proper construction of Section 10(f), under which no adjustment should be made reflecting periods predating the classification of a claimant's disability as permanent total.[4]

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[4] In the context of presenting a settlement to the court of appeals in *Holliday*, counsel for the Director argued in favor of the

Petitioners thereupon paid the compensation due respondent for her first 104 weeks of compensation in accord with the OWCP calculation using the *Brandt/Holliday* methodology. Pet. App. 4a. Petitioners did not raise the Section 10(f) issue in their appeal to the Benefits Review Board, in which they challenged only the ALJ's finding of total disability. *Id.* at 4a, 40a.

In June 1994, the Board affirmed the ALJ's finding that respondent was permanently and totally disabled, but vacated and remanded the ruling that the Special Fund was liable. Pet. App. 38a-46a. Ultimately, after the remand and another appeal to the Board on the Section 8(f) "second injury" issue, the Board in December 1996 held that petitioners were not entitled to relief from full liability under Section 8(f), but were liable for the payment of all benefits. *Id.* at 33a-36a. After the Section 8(f) issue was resolved against them, petitioners reimbursed the Special Fund for the benefits the Fund had paid pursuant to the ALJ's award and

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rule adopted by the Fifth Circuit in that case. See 654 F.2d at 417, 421-422. That rule, however, was not at the time, and is not now, the Director's interpretation of the provision. The Director's position is that Section 10(f) authorizes adjustments only after a claimant's disability has become permanent for statutory purposes, and that the provision contains no "catch-up clause" that would permit including adjustments that have taken effect in the time between the date of injury and the classification of the disability as permanent total. This view has been adopted by most of the courts of appeals to consider the question, including by the Fifth Circuit in a subsequent en banc decision. See *Bowen* v. *Director, OWCP*, 912 F.2d 348 (9th Cir. 1990); *Lozada* v. *Director, OWCP*, 903 F.2d 168 (2d Cir. 1990); *Phillips* v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990) (en banc); but see *Director, OWCP* v. *Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (per curiam) (following *Holliday* rule); *Southeastern Maritime Co.* v. *Brown*, 121 F.3d 648 (11th Cir. 1997), cert. denied, 524 U.S. 951 (1998).

commenced the payment of ongoing benefits, again making payments reflecting the *Brandt/Holliday* calculation. Pet. 11.

3. In June 1998, petitioners unilaterally decreased the periodic rate of compensation they were paying. They based that reduction on the intervening decision in *Bailey* v. *Pepperidge Farm, Inc.*, Ben. Rev. Bd. No. 97-1156, 1998 WL 285563 (May 19, 1998) (Resp. Br. in Opp. 8a-19a), in which the Benefits Review Board concluded that the D.C. Circuit, if presented with the question, would no longer follow its decision in *Brandt* because the Fifth Circuit had overruled *Holliday* (which the D.C. Circuit had followed in *Brandt*) in *Phillips* v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (1990) (en banc). Pet. App. 4a-5a. The Board then held in *Bailey* that notwithstanding *Brandt*, a claimant in the District of Columbia is entitled to only those Section 10(f) adjustments that take effect while the claimant's disability is permanent and total. In light of *Bailey*, petitioners—in addition to unilaterally reducing periodic payments to respondent—also sought an order from OWCP authorizing them to take a credit under Section 14(j) of the Act, 33 U.S.C. 914(j), for $76,626.31 in alleged overpayments that they had made, without protest, on the basis of the *Brandt/Holliday* calculation. Pet. App. 4a-5a.

Respondent in turn sought a supplementary compensation order, under Section 14(f) of the Act, declaring the amounts withheld by petitioner—and an additional 20% of such amounts under Section 14(f)—in default. Pet. App. 5a. On October 16, 1998, OWCP issued a supplementary compensation order finding petitioner "in violation [of] the final compensation order" previously issued in the case, and requiring petitioners to pay respondent $3580.68 that was owed

pursuant to the *Brandt/Holliday* methodology from the time they reduced their payments to the time of the supplementary order, plus an additional 20% of that amount, due under Section 14(f). *Id.* at 5a, 55a-56a.

Petitioners paid the back benefits owed under the supplementary order, but not the additional 20%. Pet. App. 5a-6a. Accordingly, on January 19, 1999, OWCP issued a further order under Section 18(a) declaring petitioners in default for non-payment of the latter amount. *Id.* at 6a & n.8.

4. Petitioners appealed the supplementary compensation order to the Benefits Review Board. Relying on its decision in *Bailey*, the Board held that due process required it to decide the Section 10(f) issue because the appeal represented the employer's first opportunity to challenge the imposition of liability pursuant to *Brandt/Holliday*. Pet. App. 31a. It also repeated its conclusion in *Bailey* that the *Brandt/Holliday* rule would no longer be given controlling effect in the District of Columbia because *Brandt* had stated that it would follow *Holliday* "at least until the precedent is overruled in the Fifth Circuit," and the Fifth Circuit had since overruled *Holliday*. *Ibid.*; see also note 4, *supra*. Accordingly, the Board reversed the supplementary compensation order.

The OWCP Director filed a motion for reconsideration, arguing that the Board lacked jurisdiction over petitioners' appeal. The Board denied the motion, concluding that OWCP's supplementary compensation order was not a default order within the meaning of Section 18(a). Pet. App. 14a-25a. It reasoned that although the employer might have had notice regarding the *Brandt/Holliday* method of calculation, there was no formal determination by an ALJ or the district director before October 1998 specifying that Section

10(f) adjustments were to be calculated in accord with *Brandt/Holliday*. *Id.* at 20a. Thus, in the Board's view, the October 1998 order was an original adjudication of the *Brandt/Holliday* issue, subject to review by the Board under Section 21 of the Act. *Id.* at 21a.[5] For the same reasons given in its initial opinion, the Board also rejected the Director's argument that the Board must follow *Brandt* in the D.C. Circuit until that court overrules it. *Id.* at 22a-24a.

5. Respondent sought review of the Board's decision in the court of appeals, which vacated the Board's decision and order for lack of jurisdiction. Pet. App. 1a-13a. The court noted that, although Section 21 of the LHWCA provides the Board with general jurisdiction over appeals from decisions on claims, it nonetheless agreed with the other circuits that have addressed the issue that "actions for the enforcement of orders declaring default in the payment of [installments] due under either § 914(f) or any other substantive section of the [LHWCA] are to be brought in the district court and, only subsequent thereto, by appeal to the appropriate court of appeals." *Id.* at 11a (citing *Tidelands Marine Serv.* v. *Patterson*, 719 F.2d 126, 129 (5th Cir. 1983)); see *Providence Washington Ins. Co.* v. *Director, OWCP*, 765 F.2d 1381, 1386 (9th Cir. 1985). The court concluded that the supplementary order at issue in this case "was manifestly an order for the collection of defaulted payments" owed under the 1992 compensation order and thus fell within the scope of Section 18(a). Pet. App. 11a. "The [1998] order," the court

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[5] Although the Board concluded that it possessed jurisdiction over the October 1998 order under Section 14(f), it concluded that it lacked jurisdiction over OWCP's January 1999 order declaring default. Pet. App. 21a.

observed, "was 'plainly premised on th[e] view' that *Brandt/Holliday* applied to all awards for permanent total disability under the Act," and "on the consequent proposition that the compensation * * * calculated and declared in default was 'due under' the [1992 compensation order]." *Id.* at 11a-12a (quoting Resp. Director, OWCP, Br. 15).[6] The court ruled that the Board's characterization of the 1998 order as an "original adjudication" of the *Brandt/Holliday* issue ignored the D.C. Circuit's law at the time of the 1992 compensation order, as well as OWCP's contemporaneous understanding of the compensation rate. *Id.* at 12a.

Finally, in view of its holding that the Board lacked jurisdiction to review the supplementary compensation order, the court of appeals did not reach the merits of the controversy before the Board. It accordingly did not decide whether the Board misread the D.C. Circuit's decision in *Brandt* or whether *Brandt* should be overruled to eliminate the *Brandt/Holliday* rule in the D.C. Circuit. Pet. App. 13a & n.11.

ARGUMENT

The decision of the court of appeals, which holds that the Benefits Review Board lacked jurisdiction over the appeal of a supplementary compensation order by OWCP, declaring default on an award of LHWCA compensation, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly ruled that the Benefits Review Board did not have jurisdiction over

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[6] Although the court of appeals referred to the "1992" order in the bracketed portion of the quotation in text, it is clear from the court's citation to the Director's brief that the court intended to refer to the 1998 order.

petitioners' appeal from OWCP's supplementary compensation order, which petitioners concede was an order declaring default within the meaning of Section 18(a) of the Act. Pet. i (first question presented characterizes OWCP's order as a Section 18(a) order); Pet. 5 (same characterization in argument heading). Section 18(a) is intended to provide a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards under the LHWCA. See *Providence Washington Ins. Co.* v. *Director, OWCP*, 765 F.2d 1381, 1384 (9th Cir. 1985); *Tidelands Marine Serv.* v. *Patterson*, 719 F.2d 126, 129 (5th Cir. 1983). Thus, Section 18(a) provides that when an OWCP deputy commissioner issues a "supplementary order, declaring the amount of the default," the order may be filed in district court; the order "shall be final"; and the district court shall enter judgment for the amount the order declares in default, if it "is in accordance with law." 33 U.S.C. 918(a). The courts of appeals that have addressed the question have uniformly and properly concluded that such an order is reviewable only in accordance with that procedure for enforcement in the district court and is not subject to an appeal to the BRB under Section 21 of the Act. Pet. App. 11a; *Providence Washington Ins. Co.*, 765 F.2d at 1385-1386; *Tidelands Marine Serv.*, 719 F.2d at 129.[7]

2. Petitioners acknowledge (Pet. 6) that generally orders for the collection of defaulted payments under

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[7] In *Sea-Land Service, Inc.* v. *Barry*, 41 F.3d 903, 907 (3d Cir. 1994), the court of appeals held that if an employer pays in full the amount declared in default, thereby obviating any district court proceedings, it may challenge the determination that the amount was in default by appeal to the Benefits Review Board. Petitioners here did not pay the full amount declared past due, and they therefore do not and could not rely on *Sea-Land*.

the LHWCA are reviewable only in district court. They contend (*ibid.*), however, that when a supplementary order declaring default arises out of a dispute involving an ambiguity in the underlying compensation order, an appeal lies to the Board, at least where the ambiguity had not become apparent before the 30-day period had run for appeal to the Board of the underlying order. This exception has never been recognized by any court of appeals. Moreover, there is nothing in the terms of the LHWCA that suggests that a different jurisdictional rule should apply with respect to OWCP default orders that resolve ambiguities in the underlying compensation award. Rather, Section 18(a) makes clear that "supplementary order[s], declaring the amount of the default," are "final" and should constitute the basis for judgment in district court, if in accordance with law. 33 U.S.C. 918(a).

As the court of appeals recognized (Pet. App. 12a), petitioners' proposed rule would undermine the congressional purpose of providing a swift enforcement mechanism for default orders by subjecting some of them to the delay inherent in the multi-layered Section 21 adjudication procedure.[8] In addition, a jurisdictional test that turns on whether a supplementary compensation order resolves an ambiguity in the underlying compensation order (and whether that ambiguity should

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[8] Petitioners' proposed scheme may result in an unnecessary duplication of proceedings as well. If a supplementary order resolving an "ambiguous" underlying compensation order is ultimately attained after Section 21 review proceedings, there may still be a need for a district court proceeding to enforce compliance with the order, if the employer or carrier remains recalcitrant, as in this case where petitioners failed to pay the assessment of 20% additional compensation pursuant to Section 14(f). See Pet. App. 5a, 6a & n.8, 55a-56a; p. 8, *supra*.

have been or was discovered within the 30-day period for filing Board appeals) would undoubtedly inject uncertainty into what petitioners concede (Pet. 6) is presently an "easily administered distinction" between supplementary orders that declare default, which are reviewable exclusively in Section 18(a) proceedings in district court, and other compensation orders.

In any event, petitioners' proposed test would not support Board jurisdiction on the facts of this case. Petitioners cannot plausibly maintain that they only became aware of the interpretation accorded the ALJ's 1992 compensation order, and hence of the Section 10(f) dispute, after it was too late to obtain Board review of the compensation order under Section 21. Although they dispute whether the record indicates that they were served with an April 27, 1992, OWCP memorandum and calculation sheet showing that the Section 10(f) adjustments were being made in accord with the *Holliday* decision (see Pet. 9), it is undisputed that they paid benefits shortly after the ALJ's decision based on such calculations, thereby reflecting the understanding of all concerned that the compensation award contemplated payments in accord with *Brandt/Holliday*. See Pet. App. 12a; Pet. 10-11.

Furthermore, in this particular case, it matters little whether petitioners arrived at this understanding within or outside of the 30-day period for appealing the ALJ's decision, because they did in fact file an appeal from that decision and had an opportunity to raise the Section 10(f) issue during the course of their appeal of the ALJ's finding of respondent's disability.[9] But, in

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[9] The argument accepted by the Board in *Bailey* v. *Pepperidge Farm, Inc.*—that *Brandt* no longer applied by its own terms once the Fifth Circuit overruled *Holliday* in its *Phillips* decision (see p.

fact, petitioners challenged the Section 10(f) calculation only much later, not because they found the terms of the 1992 order ambiguous, but because they wished to obtain a modification of those terms based on the Board's 1998 decision in *Bailey* holding that *Brandt* is no longer prevailing law in the D.C. Circuit. Pet. App. 12a.[10] Thus, even if the general rule of exclusive district court jurisdiction over LHWCA default orders were subject to an exception for late-emerging disputes regarding latent ambiguities in the underlying compensation order, such an exception would not apply here. This accordingly is not an appropriate case in which to consider whether such an exception exists.

3. Petitioners do not assert that there is a conflict in the circuits on the question whether the Board lacked jurisdiction over the appeal of the order in this case. To the extent the petition's references to the Fifth Circuit's decision in *Bray* v. *Director, OWCP*, 664 F.2d

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7, *supra*)—could have been made any time after 1990, when *Phillips* was decided en banc, and thus was available to petitioners in their 1992 appeal of the compensation order.

[10] Petitioners contend (Pet. 12) that the court of appeals erred in suggesting that they reduced respondent's benefits level in response to the Board's decision in *Bailey* and that the controversy arose in 1997, well before *Bailey* was decided. The court of appeals' characterization, however, is supported by petitioners' statement of facts in their brief to the court of appeals (Br. 5), which noted that petitioners resumed paying ongoing benefits after the Board's 1996 decision in this case and then stated:

> In 1998, when notified of the annual increase in benefits, [petitioners] objected to the calculation. [Petitioners] argued that pursuant to the BRB decision in *Bailey* * * *, cost of living adjustments are calculated from the date of the onset of permanency, not the first date of any temporary total disability.

1045 (1981), implicitly assert the existence of a conflict, there is no merit to the assertion.

In *Bray*, the court held that a Section 18(a) proceeding was the appropriate means for resolving the question whether there has been a default in payments due under an original award when such a question does not emerge until after the expiration of the 30-day period for appeal of the award. 664 F.2d at 1047. It further held, however, that because the deputy commissioner's supplementary order in that case had determined that there was *not* a default, there was no possibility of presenting that order to a district court with authority under Section 18(a) to determine whether it was "in accordance with law," as there is when such an order finds that there *has* been a default (and identifies its amount). In those circumstances, the court in *Bray* concluded that the general review provisions of Section 21 applied, giving the Board jurisdiction. *Id.* at 1048; see *ibid.* (defining issue before court as "whether an error of fact or law in a supplementary order finding *no default* is reviewable before the Benefits Review Board") (emphasis added). Thus, *Bray* does not provide support for the proposition that a supplementary order, like the one here, that finds there *has* been a default, may be reviewed in a manner other than through the Section 18(a) district court enforcement procedure.

4. There is no compelling reason for the Court to grant review in this case despite the absence of a circuit conflict. In fact, petitioners emphasize that their case is uncommon and unusual. Pet. 8, 10. Review of a ruling of the D.C. Circuit on this question is particularly unnecessary because, as the court of appeals explained, "[t]his case is one of the last claims likely to be brought by a District of Columbia employee under the

[LHWCA]," as extended by the Act of May 17, 1928 (District of Columbia Workmen's Compensation Act of 1928), Pet. App. 2a & n.1, and very few claims arise in that Circuit under the general jurisdictional provision of the LHWCA. See *Brandt* v. *Stidham Tire Co.*, 785 F.2d 329, 332 (D.C. Cir. 1986) (noting that the circuit "is about to have a diminished role as a reviewer of BRB decisions under the LHWCA" in light of the local District of Columbia compensation law).

Furthermore, the jurisdictional rule adopted by the court of appeals clearly does not leave employers or carriers without a forum for raising challenges to supplementary compensation orders. Petitioners here may raise arguments in district court that the supplementary compensation order is not in accordance with law, in the likely event that a Section 18(a) enforcement proceeding is brought by respondent to collect the additional compensation declared due under Section 14(f). For all of these reasons, this Court's review is not warranted.[11]

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[11] In the question presented, the petition appears also to seek review of the correctness of the *Brandt/Holliday* rule. See Pet. i. The body of the petition, however, clarifies that petitioners are not seeking certiorari on that issue, but rather are only seeking review and reversal of the court of appeals' jurisdictional ruling, to be followed by a remand of the case to the court of appeals for consideration of the substantive issue. See Pet. 16.

In any event, the court of appeals expressly did not consider or rule on the *Brandt/Holliday* issue. A grant of certiorari on that question therefore would not be warranted. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("we do not ordinarily consider questions not specifically passed upon by the lower court").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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